Stephenson

EX LIBRIS

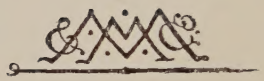
GILBERT THOMAS STEPHENSON

DR. NORMAN A. WIGGINS

Gilbert T. Stephenson,
Wilmington, Del.
Aug. 29. 1931.

Purchased at Mudies Book-
store, Kingsway, London Aug.
28. 1931.

ROMAN PRIVATE LAW



MACMILLAN AND CO., LIMITED
LONDON · BOMBAY · CALCUTTA · MADRAS
MELBOURNE

THE MACMILLAN COMPANY
NEW YORK · BOSTON · CHICAGO
DALLAS · ATLANTA · SAN FRANCISCO

THE MACMILLAN COMPANY
OF CANADA, LIMITED
TORONTO

ROMAN PRIVATE LAW

FOUNDED ON THE 'INSTITUTES' OF GAIUS AND JUSTINIAN

BY

R. W. LEAGE, M.A., B.C.L.

OF THE INNER TEMPLE; BARRISTER-AT-LAW
FELLOW OF BRASENOSE COLLEGE, OXFORD

SECOND EDITION

BY

C. H. ZIEGLER, LL.M.

LECTURER IN LAW AT PEMBROKE COLLEGE
CAMBRIDGE

DR. NORMAN A. WIGGINS

MACMILLAN AND CO., LIMITED
ST. MARTIN'S STREET, LONDON
1930

DR. NORMAN A. WIGGINS

COPYRIGHT

First Edition 1906
Reprinted 1909, 1920, 1924
Second Edition 1930

PRINTED IN GREAT BRITAIN
BY R. & R. CLARK, LIMITED, EDINBURGH

AD MATREM

000359

PREFACE TO THE SECOND EDITION

No apology is needed for the publication of a new edition of this work for beginners in Roman Law, though an earlier appearance would, perhaps, have been more welcome. The mistakes of the previous edition have been corrected so far as my own limitations have permitted, and matter previously dealt with in notes has been incorporated into the text, for experience shows that to the ordinary student notes are in the nature of trimmings that may be disregarded. There has been some small rearrangement of the matter dictated by considerations of logic and convenience. My thanks are due to Mr. P. W. Duff, Fellow and Lecturer of Trinity College, who was good enough to point out various mistakes, and to help with the proof sheets; to Mr. W. J. C. Turner, Fellow and Lecturer of Trinity Hall, for some most valuable suggestions; and, in particular, to Dr. D. T. Oliver, Fellow and Lecturer of Trinity Hall, who, in a busy life, seems always able to help those who, like myself, need the skill and experience he can so well afford to give.

Where I have departed from the views expressed in the previous edition, I have done so in reliance on some most valuable notes I took when attending Professor W. W. Buckland's lectures, while the same authority's *Text Book of Roman Law* has afforded me that guidance without which I could not have undertaken or discharged the responsibility of a new edition.

Unlike Justinian's "Tanta" I can make no claim that this little book is free from inconsistencies and mistakes; for those that persist the responsibility is mine alone. But I do hope that the new edition will continue to meet the needs of those who, for examination purposes, are required to be equipped with an elementary knowledge of the principles of Roman law.

C. H. Z.

April, 1930.

PREFACE TO FIRST EDITION

This is an attempt to meet a want which I have felt in teaching Roman Law at Oxford, viz. some book which is content to give, as simply as possible, the subject-matter of the *Institutes* of Gaius and Justinian, following, in the main, the original order of treatment. It has proved impossible to keep strictly within these limits, and while I have sometimes judged it expedient to omit minor details of little practical importance, such as some of the degrees of cognatic relationship, I have also found it necessary, in order to make a coherent statement, to add information not contained in the *Institutes*, but derived from the *Digest*, *Code*, *Novels*, or from modern Civilians. In some cases, where the evidence is weak or controversy rages, I have ventured to state dogmatically what in a more pretentious work would require qualification. The Historical Introduction presupposes a knowledge of the elements of Roman Constitutional History.

I have to acknowledge my obligations to the works below mentioned.

R. W. LEAGE.

11 New Square,
Lincoln's Inn.

Imperatoris Justiniani Institutiones, Moyle, 5th ed.; *Roman Private Law in the Times of Cicero and the Antonines*, Roby; *An Introduction to the Study of Justinian's Digest*, Roby; *Gai Institutiones*, Poste, 4th ed.; *Historical Introduction to the Private Law of Rome*, Muirhead, 3rd ed.; *The Institutes of Gaius and Rules of Ulpian*, Muirhead; *The Institutes of Justinian*, Sandars; various Articles on legal topics; Smith's *Dictionary of Greek and Roman Antiquities*; *Manuel Élémentaire de Droit Romain*, Girard, 8th ed.; *The Institutes*, Sohm, edited by Ledlie, 3rd English ed.; *Römische Processgesetze*, Wlassak.

References to Roby and Muirhead denote *Roman Private Law* and the *Historical Introduction* respectively, where it is not otherwise expressly stated.

To this must be added Professor W. W. Buckland's *Text Book of Roman Law*.

CONTENTS

INTRODUCTION

PAGES

SOURCES AND ARRANGEMENTS OF ROMAN LAW—

Jus civile, jus gentium, jus naturale, jus honorarium . 1

1. *Jus non scriptum* (custom) 6
2. *Jus scriptum* 7
   (i.) *Leges* 8
   (ii.) *Plebiscita* 12
   (iii.) *Senatus consulta* 12
   (iv.) *Principum placita* 14
   (v.) *Magistratuum edicta* 16
   (vi.) *Responsa prudentium* 27

PART I.—THE LAW RELATING TO PERSONS

1. *Libertas* 54
2. *Civitas* 74
3. *Familia* 77
   1. *Patria Potestas* 80
   2. Persons *in mancipii causa* 96
   3. *Manus* 97
4. *Tutela* and *Cura* 108
5. *Capitis Deminutio* and *Existimationis Minutio* . . 126

PART II.—THE LAW RELATING TO THINGS

1. The Classification of '*Res*' 136
2. *Dominium* and Rights *in rem* falling short of *dominium* . 141
3. Methods of Acquisition of *Res singulae* . . . 149
   (i.) Natural 150
   (ii.) Civil 159

PAGES

4. *Jura in re aliena* 176
   (1) Servitudes 177
   (2) *Emphyteusis* 188
   (3) *Superficies* 189
   (4) *Pignus* 190
5. Universal Succession 196
   1. Testate Succession 198
      Specially Privileged Wills 208
   2. Intestate Succession 267
   3. *Bonorum Possessio* 278
   4. *Addictio bonorum libertatis causa* . . . 281
   5. *In jure cessio hereditatis* 283
   6. Bankruptcy, Adrogation, etc. 284
6. Obligations 285
   1. Contracts, Innominate Contracts, *Pacta vestita* . 290
   2. Quasi-Contracts 349
   3. Transfer and Discharge of Contractual Obligations . 352
   4. Delicts 360
   5. Quasi-Delicts 380
   6. Transfer and Discharge of Delictal Obligations . 382

PART III.—THE LAW RELATING TO ACTIONS

1. General View 386
   (i.) *Legis Actiones* 386
   (ii.) The Formulary System 397
   (iii.) The System of *Cognitio Extraordinaria* . . 415
2. Division of Actions 418
3. *Compensatio* and *Deductio*. *Plus Petitio* . . . 426
4. *Actiones Adjectitiae Qualitatis*. Noxal Actions. *Pauperies* 431
5. Pretorian Remedies 434
   1. Interdicts 434
   2. *Restitutio in integrum* 443
   3. *Missio in possessionem* 444
   4. Pretorian Stipulations 444
6. Modes of Execution 444
7. Restraints on Vexatious Litigation 448

INDEX 451

TABLE OF DATES[1]

	B.C.
Foundation of Rome	753
The Republic	509
XII Tables	451–448
Lex Canuleia	445
Praetor urbanus	367
Lex Publilia (Philonis)	339
Lex Poetelia	Before 300
Lex Silia	326–287
Lex Ovinia	310
Jus Flavianum	304
Lex Hortensia	287
Lex Aquilia	(?) 287
Praetor peregrinus	242
Lex Cincia	(?) 204
Lex Voconia	169
Lex Aebutia	*circa* 150–126[2]
Julius Caesar killed	44
Cicero killed	43
Lex Falcidia	40
Caesar Octavianus (Augustus) receives *imperium* for life	27
Leges Juliae de adulteriis	18
Lex Fufia Caninia	2
	A.D.
Lex Aelia Sentia	4
Lex Papia Poppaea	9
Tiberius	14–37
Lex Junia Norbana	(?) 19
Caligula	37–41
S.C. Velleianum	46
Claudius	41–54
Nero	54–68
Vespasian	69–79

	A.D.
S.C. Trebellianum	(?) 57
S.C. Neronianum	64
S.C. Pegasianum	(?) 73
Titus	79–81
Domitian	81–96
Nerva imp.	96–98
Trajan	98–117
Hadrian imp.	117–138
S.C. Tertullianum (Under Hadrian)	
Edictum Perpetuum	(?) 125–129
S.C. Juventianum	129
Antoninus Pius	138–161
M. Aurelius and Verus	161–169
Marcus Aurelius (sole)	169–180
S.C. Orphitianum	178
Commodus	180–193
Septimius Severus	193–211
Caracalla	211–217
Papinian killed	212
Alexander Severus	222–235
Ulpian killed	228
Gordian	238–244
Diocletian	285–286
Diocletian and Maximian	286–305
Constantius I. and Galerius	305–306
Constantius I., Galerius, and Constantine	306
Codex Gregorianus	*circa* 306
Galerius, Constantine, and Licinius	307–311
Constantine and Licinius	311–323
Constantine (sole)	323–337

[1] Some of these dates are conjectural.

[2] For discussion as to probable date see Girard, pp. 996-998.

	A.D.
Codex Hermogenianus	(?) 350
Valentinian and Valens	364
Theodosius I. (in the East)	408–450
Valentinian III. (in the West)	425–455
Law of Citations	426
Codex Theodosianus	438
Leo II. (East)	457–474
Fall of the Western Empire	476
Zeno	474–491
Anastasius I.	491–518
Justin	518–527
Justinian	527–565
Codex vetus published	529
Digest and *Institutes* published	533
Codex repetitae praelectionis	534

INTRODUCTION

THE SOURCES AND ARRANGEMENTS OF ROMAN LAW

Jus civile, jus gentium, jus naturale, jus honorarium.

We shall approach the study of Roman Law by drawing attention to the fact that in early societies law is national rather than territorial in its application. This means that the full benefits of Roman law and procedure were secured to the *civis* or Roman citizen alone. Now the rules of law governing any particular people are partly a product of the national consciousness of that people, and partly a development due to the circumstances of its historical environment, and, as these factors of legal development are not constant everywhere, it follows that the law of each people is a national product peculiarly its own. The Roman lawyers recognised this by applying to that part of the law of the State available only to its own nationals the term *jus civile* or civil law. Now early law is the result of custom, so that the legal customs of the Romans alone at first constituted the *jus civile*, but when legislation begins to supplement custom to meet the needs of social development, the term *jus civile* covers both. Legislation in an early society is not very active, and its earlier manifesta-

tions are rather concerned with shaping the constitution than with private rights. Accordingly a less formal method of legal development is needed, and this is supplied by the edict of the *praetor*, an official whose duty it was to preside over the administration of justice, and for this purpose to lay down rules governing the conduct of his office. This in turn produced a considerable body of law called the *jus honorarium*, which thus came to be opposed to the *jus civile*.

Nations, like individuals, cannot live alone, and intercourse between the nationals of neighbouring states is an inevitable consequence. But as the non-Roman, originally significantly known as *hostis*, a term applied indifferently to strangers and enemies, could not claim the benefits of the *jus civile*, a body of rules was gradually evolved to meet the difficulty and known as the *jus gentium* or the law common to nations in their mutual intercourse. Very naturally this was concerned mainly with commercial intercourse, for the rising power of Rome, with its attendant wealth and luxury, was sure to attract the foreign trader with welcome commodities to sell. To deal with the influx of aliens or *peregrini*, in 242 B.C. a special *Praetor Peregrinus* was instituted, in whose edict there grew up a body of rules largely incorporating the *jus gentium*, together with the necessary details of procedure governing their application in the tribunals.

The exact source of the *jus gentium* has been variously conjectured. According to Sir Henry Maine [1] it was the result of a conscious effort on the part of the Roman praetor to discover the common element

[1] *Ancient Law*, chap. iii.

in the law of Rome and that of the surrounding Italian communities to which the immigrants belonged. But the Roman praetor of the period was hardly possessed of the intellectual equipment for such a task, though this account has the merit of coming near to that given by some of the Roman jurists.[1] Another view is that the *Praetor Peregrinus* applied the principles of natural justice, and in this way, bit by bit, a settled body of usage grew up, which no doubt incorporated such rules of mercantile custom as were generally accepted, yet freed from the excessive formalism that characterised the rules of the *jus civile*, and capable of expansion according to the needs of the times, as the discretion of the praetor was unfettered in the matter of its development. Perhaps the best view is that taken by Sohm, that the *jus gentium* was not the importation of alien law into Rome, but rather a development from within, modelled on the rules of the *jus civile*, and transforming the central ideas that underlay that system into a body of rational rules, with the dominant purpose of promoting commercial intercourse.[2]

Thus it came about that the presence of aliens at Rome, generally in the interests of trade, led to the antithesis represented by the terms *jus civile* and *jus gentium*, the former being the law competent to *cives* alone, the latter common ground for all. This duplication of institutions was destined to have far-reaching consequences, for through the *jus gentium* came the ideas that it was the intention of the parties, rather than the form of the transaction, that ought to count,

[1] G. i. 1 and J. i. 2. 2.

[2] For the whole subject see Sohm's *Institutes of Roman Law* (Ledlie's translation), 3rd ed. pp. 64-84.

and that good faith and fair dealing could alone provide an acceptable basis for legal transactions. But it would be wrong to regard the *jus gentium* as anything but a portion of Roman law itself, first taking shape in the edict of the *Praetor Peregrinus*, then acting as ferment in the direction of reform in the edict of *Praetor Urbanus*, and, finally, through the influence of the great jurists, as we shall see later, the streams of the *jus civile* and the *jus gentium* were mingled into the broad stream of Roman law, destined to fertilise all the legal systems of the world.

Justinian makes mention of a third element, the *jus naturale*, whereas Gaius identifies the *jus gentium* and the *jus naturale*. Its exact nature has been much discussed. Ulpian confuses it with animal instinct. Others hold it to be the ideal upon which all law should be moulded. Sometimes it is regarded as a species of paramount law which no legal system may override. It resembled the *jus gentium* in being of supposed universal application, and the two are generally identified except in relation to slavery, which is attributed to the *jus gentium*, but contrary to nature.[1] Perhaps the true relation between the two is that the *jus naturale* represents the moral basis upon which law must rest, if it is to be the instrument of justice, while the *jus gentium* is the actual achievement of the law, based on this ideal.

The *jus gentium* is not to be confused with the *jus honorarium*, or the law built up by the magistrates through their edicts. No doubt many rules of the latter were derived from the former, but on the other hand many rules of the *jus honorarium* were exclusively concerned with civil institutions and many

[1] See Maine's *Ancient Law*, chap. iii., and Pollock's note E.

juris gentium institutions were not established by the edict.

Jus scriptum and *jus non scriptum.*

Justinian, following the Greeks, divides law into the *jus scriptum* or written law and the *jus non scriptum* or unwritten law, but these terms are not to be understood in their literal sense. The exact meaning of the opposition is not quite clear. It is submitted that the general intention seems to be to mark off law that is *imposed* by some person or body under the constitution armed with the necessary authority, as distinguished from law that *grows* spontaneously through the usages of the people; the former is official in origin, the latter is popular.

Whether this be correct or not, it is quite clear that by unwritten law is meant law based on the customs of the people and thus, by their tacit consent, enjoying the force of statute,[1] not merely in the Republic but throughout to the time of Justinian. Its legal validity is emphatically stated both in the *Digest*[1] and the *Code.*[2] It can not only create rules of law, but it can abrogate statute itself.[3] There is, however, a contradiction with regard to the latter point, for Constantine[4] seems to have decided that the abrogative force of custom was not to extend to an enactment that specially provided against this, but the *Digest*[1] asserts the contrary.

Originally the whole of the *jus civile* was based on custom, much of which was subsequently embodied in the XII Tables. But custom as an independent source of law survived to Justinian, even after his

[1] J. i. 2. 9.
[2] D. i. 3. 32. 1.
[3] C. 8. 52. 2.
[4] J. i. 2. 11.

comprehensive legislation.[1] The whole of the *jus gentium* originally rested on custom, and continued to do so except to the extent to which it became *scriptum* by incorporation into the edict or by legislation.

Section I. Jus non scriptum, or Custom

A custom may be explained as follows: Where an act is capable of being performed in more ways than one, but is almost invariably done in some particular manner, a custom exists that the act shall be so performed. Whether this custom is a *customary law*, as distinguished from a custom simply, depends upon whether, if brought up in a Court of Law, the custom would be approved. This is a question for the Court. If the custom is universal, reasonable, and not opposed to any definite rule of law, it will nearly always be treated as law proper, *i.e.* not as a rule which the citizens *may* obey, but as one which they *must*.

Sir Henry Maine found the earliest conception of law in the *Themistes*, or divinely inspired judgments of the early kings, but it is probable that at Rome, at any rate, the earliest law was custom, springing unconsciously from the habits and life of the people themselves. This customary law soon became fixed and inelastic, chiefly, perhaps, because at an early date it was embodied by the legislature in a code drawn up by the *Decemviri* and known as the XII Tables, of which the traditional date is 451–448 B.C.[2]

[1] See p. 7.

[2] For other views see Lambert, *L'histoire traditionnelle des XII Tables.*

It would be a mistake, however, to think that after this early code *usus* finally ceased to be a source of law, both because it is improbable that the whole of the existing customary law was embodied in it, and also because Justinian,[1] more than a thousand years afterwards, expressly states, '*ex non scripto jus venit quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur.*'[2] What is more remarkable to an English lawyer is that the Romans took the view that an existing statute might even be repealed by adverse usage, '*ea vero* (i.e. *jura*) *quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata.*'[3]

Examples of laws resting on custom and dating from a period prior to the XII Tables are the rules as to *patria potestas* and the rights of *sui heredes* and of the *gens* in relation to intestate succession; at a much later period *fideicommissa*, codicils and, probably, the literal contract, may be traced to the same origin.

Section II. Jus Scriptum (Written Law) consisting of

(1) *Leges.*
(2) *Plebiscita.*
(3) *Senatus consulta.*
(4) *Principum placita.*
(5) *Magistratuum edicta.*
(6) *Responsa prudentium.*

[1] In the time of Gaius *usus* was overshadowed by the writings of the Jurists and statute law, which may account for his omission of custom as a source of law.

[2] J. i. 2. 9.

[3] J. i. 2. 11. And again in the *Digest*: *Quare rectissime illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.* See p. 5.

(1) *Leges.*—*Lex* is a term wide enough to include not only the whole of statute law, but every species of legal rule. Used, however, in the strict sense, viz., as something different from *plebiscita*, *senatus consulta*, and *principum placita*, it is reputed to include the laws of—

(*a*) the early kings,
(*b*) the *Comitia Curiata*,
(*c*) the *Comitia Centuriata*, and
(*d*) the *Comitia Tributa*.

(*a*) *Laws of the early kings—the so-called Leges Regiae.*

At the beginning of Roman history the Roman people were governed by kings. The evidence with regard to these times is almost wholly legendary, but that there was such a period is proved by the survival in republican times of institutions such as the *rex sacrorum* and the *interrex*, which presuppose that there was a regal epoch before the Republic. A well-known passage in the *Digest* is sometimes cited to prove that these kings themselves legislated: *Et ita leges quasdam et ipse* (*i.e.* Romulus) *curiatas ad populum tulit, tulerunt et sequentes reges quae omnes conscriptae exstant in libro Sexti Papirii qui fuit illis temporibus*[1] (Romulus himself carried certain enactments through the curiate assembly, and so did the succeeding kings, all of which are recorded in the collection of Sextus Papirius, who was of those times). But it seems probable that the laws made by the legendary kings were little more than declarations of religious custom for the guidance of the people. The *Jus Papirianum* was made the subject of a com-

[1] D. i. 2. 3. 2.

mentary by Granius Flaccus towards the end of the Republic and appears to have consisted of rules relating to religion (*fas*), rather than legislation in the modern meaning of that term. The evidence of history is all against the view that legislation is an early means of legal development or of law reform.

(*b*) *The Comitia Curiata.*

The Roman people were originally divided into three tribes, each tribe being composed of ten *curiae*, and the male members of these *curiae* who were capable of bearing arms formed the *Comitia Curiata*, each *curia* voting as a unit on the matters submitted to it. It was at first confined to the patricians or members of the original tribes that formed the Roman people, but later the plebeians who were subsequent arrivals gained admission, but perhaps not the right to vote. This body had certainly no power of initiating legislation, and it is very doubtful whether laws were ever submitted to it for enactment. It met only when called together by the King. Its real power lay in the fact that no change affecting any important department of public or private law could be made save with its consent. When the *Comitia Curiata* met for the convenience of individuals, *e.g.* to sanction adrogations, a form of adoption, or the making of a will, it was called the *Comitia Calata*, and in this form, represented by thirty lictors, it survived in republican times and under the early empire. The Senate, whose function was to nominate the King and tender him counsel, was an advisory body of elders, and is said to have been formed of the heads of the Roman *gentes*.[1] The nomination had

[1] The *gens*, a subdivision of the *curia*, seems to have been a kind of clan consisting of families united by the peculiar Roman tie of agnation.

to be confirmed by the *Comitia Curiata*, who by a *lex regia* conferred his *imperium* (royal authority) upon him, a practice revived under the Empire.[1]

(*c*) *The Comitia Centuriata.*

For Rome in its earlier stages the *Comitia Curiata* sufficed, but matters took on a new complexion when a numerous body of persons came to live on Roman soil who were not members of the three patrician tribes. These people, who were soon known as the plebeians, being liable to taxation and to military service,[2] naturally desired voting power which was necessarily denied them in the *Comitia Curiata*, since the plebeians were not members of any Roman family. The reforms attributed to Servius Tullius paved the way for the creation of two new *comitia* which, at any rate partially, remedied this grievance. The first of these *comitia* was the *Comitia Centuriata*, which, though based in theory upon the arrangement of the Roman people into centuries from a military point of view, was in fact organised on the principle of wealth, and accordingly any one, patrician or plebeian, could, if of sufficient substance, attend it, but the voting power was really secured to the wealthier classes who had the majority of votes. This *comitia* had, however, no power of initiating legislation, for no measure could be proposed there except by a consul, and he could bring forward nothing without the previous approval of the Senate, whose subsequent *auctoritas* was also needed, until the *lex Publilia Philonis*, 339 B.C., required this to be given in advance. At some date which is uncertain, and in some way which

[1] J. i. 2. 6.

[2] Some civilians, however, consider that the plebeians were not originally liable to military service, and that the object of the Servian census was to create such liability.

is obscure, the centuries became incorporated in the tributal or district organisation of the people. The *Comitia Centuriata* now elected the magistrates, but the *Comitia Curiata* continued to confer their *imperium* upon them. Legislation in the modern sense now begins, the most important early enactment being the law of the XII Tables, the celebrated code which was the foundation of Roman law and which, though greatly improved and modified, was never wholly superseded by subsequent legislation, but continued to be, in theory, the ancient source from which all law flowed until the time of Justinian himself.[1]

(*d*) *The Comitia Tributa.*

The other *comitia* which is said to have sprung from the reforms of Servius Tullius is the *Comitia Tributa*. This assembly was based, not, like the *Comitia Curiata*, on the ancient gentile and family organisation, nor, like the *Comitia Centuriata*, on the possession of property, but on a division of the Roman people according to districts. Being so based this assembly included the plebeians as well as the patricians. Its origin is obscure. According to Mommsen it was due to the Valerio-Horatian laws of 449 B.C. The number of tribes (*districts*) rose from four to thirty-five. Its resolutions, like those of the *Comitia*

[1] The chief grievances of the *plebs* which led to the passing of the XII Tables were—

(i.) Their inability to hold *ager publicus*.

(ii.) Their exclusion from marriage with patricians.

(iii.) The fact that the knowledge and administration of the law was wholly in the hands of the pontiffs, who were themselves patricians.

(iv.) The power of the magistrates to exact arbitrary fines. But the XII Tables did little directly to remedy these matters, the chief value of the code being that henceforth the plebeians knew the main outlines of the law under which they lived. For the provisions of the XII Tables see Index.

Centuriata required the confirmatory *auctoritas* of the Senate, but the *lex Publilia Philonis* may have applied here too. The voting unit was the *tribus*. It was presided over first by the consul and later by the praetor.

(2) *Plebiscita.*—Besides the above-mentioned bodies whose legislation is strictly described as *leges*, there was the *Concilium Plebis*, probably a consequence of the organisation of the plebeians under the tribune, to secure the removal of the disabilities, social, economic, and political, under which they laboured. Like the *Comitia Tributa*, it was based on the tributal system, and is with difficulty distinguished from that assembly. At any rate the constant pressure created by the organised plebeians eventually gained its object not merely in the removal of their disabilities, but in causing later legislation to fall into the hands of this body, whose resolutions after the *lex Hortensia*, 287 B.C., acquired the force of *leges*, and are often called such, though technically only *plebiscita*. The approval of the Senate was never needed.

(3) *Senatus consulta.*—In the regal and republican periods the Senate enjoyed no legislative power. It was an advisory body, nominated by the King, and at first purely patrician. Later it was nominated by the consuls, and included patricians and plebeians to the number of three hundred, its chief duty still being to tender advice to the magistrates in the discharge of their duties. The *lex Ovinia*, about 312 B.C.,[1] transferred the nomination of senators to the censors, with a direction that vacancies were to be filled from ex-magistrates, a circumstance which added largely to

[1] Girard, p. 36.

its political weight at a time when the popular assemblies were becoming unstable. To the direction of the Senate the magistrates gave effect in their edicts. The control of the Senate over nominations to the magistracies, and the established practice of the consul or praetor to consult the Senate as to any legislative change to be proposed to the assemblies, resulted in a certain control over legislation which further required the *auctoritas* of the Senate to become effective. Though these checks disappeared, as already noted, the Senate was a constantly growing force in a decaying constitution, especially after the *lex Ovinia*. Augustus fixed its numbers at six hundred and resolved to make it the effective instrument of his will, for as its president he could determine its activities, and by getting himself appointed Censor he could fill it with his nominees. From Domitian the Emperor always made the nominations. The theory still was, till the time of Hadrian, that *senatus consulta* were directions to the magistrates, who were now in fact, if not in name, bound to give effect to them, till by a process of gradual usurpation *senatus consulta* came to be direct legislation. Under the Empire it had become usual for a body known as the *Consilium Principis*, later called the *Consistorium*, to draft the proposed *S.C.* for submission to the Senate, usually in an *Oratio Principis* which the Senate had really no alternative but to accept, until in the end the Senate was reduced to registering what were in effect imperial enactments. After the third century A.D. we hear no more of the Senate, the function of legislation being the exclusive prerogative of the Emperor.

If we exclude the XII Tables, *leges* and *plebiscita*

contributed very little to private law. In the confusion that clouded the end of the Republic, when the institutions that had sufficed for a city-state had broken down hopelessly when applied to a state comprising the greater part of the then known world, and the delicate work of legislation could hardly be discharged by assemblies that were little better than unruly mobs, a struggle for the supreme power became inevitable. This was seized first by Julius Caesar, and, after his assassination in 44 B.C., it passed to the second Triumvirate or committee of three, of whom Augustus was one. Eventually Augustus firmly established his power, but as a matter of policy surrendered to the assemblies their old prerogatives of legislation and the appointment of magistrates, reserving, however, the right of objecting to or suggesting candidates, and, in virtue of his *tribunicia potestas*, of summoning the *Concilium Plebis* and legislating through it, though it was not invariably compliant. After his death *leges* gradually cease, the last being in the reign of Nerva towards the very end of the first century A.D. The way was paved for a new legislature.

(4) *Principum placita.*—Laws made by the Emperor in their various forms are generally known as Imperial Constitutions. Hadrian (A.D. 117–138), having ended the growth of law in the Praetorian Edict, claimed the power of direct legislation, and a theoretical basis for this was found in the *lex regia*, by which the sovereignty of the people was deemed to be conferred upon the Emperor. This was a fiction to cloak the fact that there had been a gradual usurpation of law-making power by the Emperor which it was wise to clothe with a legal origin. But it was not until the end of the third century A.D. that the Emperor claimed to

be the sole law-making organ of the State; hitherto the Senate had served his turn. He was assisted in his task, no matter what form of imperial constitution was required, by the advice of a council of jurists, later called the *Consistorium*, at the head of which was the *Quaestor Sacri Palatii*. Imperial constitutions include—

(*a*) *Edicta* or general enactments, in virtue of the *jus edicendi* which the Emperor in common with all the superior magistrates enjoyed. Originally these were binding during the period of his office which was for life, unless renewed by his successor, but in the later Empire they continued to bind until repealed.

(*b*) *Decreta* were judicial decisions of the Emperor, whether sitting as a court of first instance or by way of appeal. Many of them did no more than dispose of the case, but where a new rule of law was laid down or uncertainties cleared up they were binding.

(*c*) *Rescripta.*—A convenient practice of taking appeals by way of rescript instead of by a *decretum* grew up. An official who held high rank could approach the Emperor for an opinion on some legal question before him, a privilege also accorded to private persons. In the former case an *epistola*, a separate letter by way of reply, was sent, while in the case of the latter, the answer was given on the application itself (*subscriptio*). If in this way a new rule of law of general application was laid down, Justinian directed that it was to be binding in future cases.

(*d*) *Oratio.*—This was a proposal of the Emperor for the consideration of the Senate, but as this body came to be merely a convenient cloak for imperial legislation, it became common to quote the *oratio* as the source of the law and not the resulting *S.C.* By

the time of Constantine an *oratio* was really an imperial ordinance of which notice had been given to the Senate. But the form of communicating it to the Senate was soon discarded, for the Empire had now become an open despotism. Henceforth the imperial statute (*lex generalis*, or *lex edictalis*) was published to the nation directly.

(*e*) *Mandata* are not mentioned among imperial constitutions in the sources. They had little to do with private law, being directions to imperial officials for the discharge of their functions.

(5) *Magistratuum Edicta.*

1. *What the Edict was.*

Every superior magistrate at Rome had the *jus edicendi*, *i.e.* the right of issuing a proclamation or statement defining by what principles he would be guided in carrying out the duties incident to his office. The most important magistrates, from the lawyer's point of view, were the two praetors, the *Praetor Urbanus* and the *Praetor Peregrinus*, and the edict was originally a proclamation published in their courts at the beginning of their year of office. Edicts were divided into—

(*a*) The *Edictum Perpetuum*, *i.e.* the edict which each praetor issued at the beginning of his year; probably called *perpetuum* because it was intended to be binding upon him during the tenure of his office, any flagrant departure from it being regarded as unconstitutional; and

(*b*) The *Edictum Repentinum*, *i.e.* an edict issued during the year of office to meet some sudden and unexpected emergency.

It was not customary for a praetor in issuing his edict to devise a wholly new one; he was content

to take over from his predecessors everything which custom had established, or which, though new, had proved of real use; the part so adopted was called *Tralatitium*, as distinguished from the praetor's own innovations, which would usually be of limited extent and importance.

There were edicts of other magistrates:

(i.) The *Edictum Provinciale*. In the provinces the functions of the praetors were exercised by the local governors, and their proclamations or edicts had as much the force of law as those of the praetors at Rome.[1]

(ii.) The Edicts of the Curule Aediles. The *jus edicendi* was not the exclusive right of the praetors; it was, as above stated, possessed by every superior magistrate, but the only edicts of importance, besides those mentioned, were those of the Curule Aediles, from whose proclamations certain legal rules were established, *e.g.* the implied warranty in the law of sale.

2. *The influence of the praetors on Roman law.*

The history of the praetors begins with the appointment of the *Praetor Urbanus* 367 B.C. He was appointed, not in any way to reform the law but as a magistrate for Rome, and the law he administered was the *jus civile* of Rome as found in custom and the XII Tables, a law which was only available for Roman citizens, and which was extremely primitive and narrow, since practically it only accorded recognition to such rights as could be enforced by certain scanty and extremely inelastic legal proceedings known as *legis actiones*. Being appointed merely to supervise the administration of justice, it is improbable that at first the praetor could develop the law by his edict; he had

[1] *I.e.* within their jurisdiction.

merely to apply the law of Rome as it stood to particular cases; but, at the same time, it is important to remember that the praetor had the technical right to issue an edict if he wished, and that he was regarded as invested with the ancient judicial power of the King; in other words, he had a certain discretion in the exercise of his authority unless bound by the fetter of some statute, or ancient custom. It is therefore reasonable to suppose that at a comparatively early date the *Praetor Urbanus* began to issue his edict defining the principles he would follow in exercising his *jurisdictio* (official authority). It is impossible, however, to imagine that had the matter rested here the Praetorian Edict could have exercised its undoubted influence upon the ancient civil law, since so long as the method of procedure known as the *legis actio* system prevailed, the most the praetor could do would be to disallow an action which lay at *jus civile* because of the inequitable conduct of the plaintiff, or to assist a man who had been wronged, but to whom no *legis actio* was open, by compelling the offender to enter into a wager (*sponsio*) on the merits of the case, which could then be tried in the ordinary manner, since a *legis actio* was always possible where a definite sum of money was claimed. The real reason for the success of the Praetorian Edict as a reforming agent is attributable partly to the appointment of the *Praetor Peregrinus* 242 B.C., partly to the *lex Aebutia* (*circa* 149–126 B.C.).[1]

Political causes had from the earliest times much to do with the development of Roman legal institutions. The differences with regard to political representation between the patricians and the plebeians

[1] Girard, *Manuel élémentaire*, p. 41.

were finally settled, as above stated, by the *lex Hortensia*; and the position of the plebeians as regards private law (a position which had originally been as unsatisfactory as was their political status) had by degrees—notably by the enactment of the XII Tables and the *lex Canuleia*, 445 B.C.[1]—become by the date of the Hortensian law as good as that of the patricians for all practical purposes. In later times this distinction between the *populus* and the plebeians is paralleled by the distinction between Roman citizens on the one hand and *peregrini* on the other.

From an early date the presence of foreigners (*peregrini*) had caused a difficulty. The *jus civile* of Rome was regarded as the exclusive privilege of Roman citizens, and no one but a citizen could claim its protection. A *peregrinus*, accordingly, had no sort of legal status. Up to about the third century B.C. the Romans met this difficulty by inserting a clause in their treaties with foreign nations, providing that disputes between the citizens of those nations and Roman citizens should be tried by a special tribunal of *recuperatores*; but as Rome grew in power she became intolerant, and by the middle of the century in question this practice ceased. Nevertheless disputes between foreigners, or between foreigners and citizens, were bound to occur, and with the growth of Rome's commercial power to become more and more frequent; and no State, especially a young one, can long afford to permit disputes within its borders free from the control of the law.

Accordingly in the year 242 B.C. a second praetor, the *Praetor Peregrinus*, was appointed to deal with disputes in which *peregrini* were concerned. The *jus*

[1] Which permitted marriage between the two orders.

civile of Rome being inapplicable, the question arose by what law and by what procedure the quarrel was to be settled. Sir Henry Maine says that the law the *Praetor Peregrinus* administered was that which he found by observation to be common to all the people who lived around or who came to Rome, and also common to the *jus civile* of Rome. By observation of the neighbouring tribes, for example, the praetor would find that the essential thing in the transfer of ownership of property was *traditio*, or the actual handing over of the thing in question, coupled with some good reason for the *traditio*, such as a sale and the price paid. *Traditio* (or delivery), though not essential to the transfer of the ownership of certain classes of property by the peculiar method of *mancipatio*, either accompanied that transaction or followed it, for though the ownership passed without *traditio*, it was incumbent upon the vendor to deliver possession of the thing sold, and so, according to Sir Henry Maine, the praetor seized upon *traditio* as a title to property common to the law of all nations (*jus gentium*), and used it as a test to decide the ownership of property where *peregrini*, or a *peregrinus* and a *civis*, were concerned. Sir Henry Maine proceeds to state that at first the Romans regarded the *jus gentium*, not with the respect a modern lawyer would feel for principles of conduct found in all societies, but as a disagreeable expedient forced upon them by political necessity ; and that a change of feeling came upon the conquest of Greece, when, as he says, the doctrines of Stoic philosophy at once gained acceptance among the cultured Romans, more especially among the Roman lawyers. The teaching of the Stoics is summed up in the expression ' Life according to Nature,' and Sir

Henry Maine states that although the Stoic philosophy was never worked out in detail in relation to legal institutions, so as to form an ideal code (*jus naturale*), yet the Roman lawyers at once perceived that were it so worked out it would correspond in nearly every detail with the principles of *jus gentium*; and this is what he means by the proposition that *jus naturale* is simply *jus gentium* seen in the light of a particular theory, viz., in the light of Stoic philosophy. The principles of the *jus gentium* having gained recognition in this way, their adoption by the *Praetor Urbanus*, as well as by the *Praetor Peregrinus* followed, according to Sir Henry Maine, as a matter of course; and, accordingly, the reform of the ancient law was only a question of time.

Sir Henry Maine's theory is open to criticism. In the first place, it is tolerably clear that the *Praetor Peregrinus* did as a fact, in deciding cases where aliens were concerned, take a body of law known as *jus gentium* as his guide, but it is unlikely that he consciously went through the comparative process above described. The mistake (as Dr. Moyle points out) seems to lie in attributing modern scientific ideas to what, after all, was a rather primitive state of society. The *jus gentium* which the *Praetor Peregrinus* administered may have been little more at first than the customs of the particular foreigners who were at the moment before him.[1] As time went on, no doubt, the praetor would get together a very large body of customs in this way, and it is extremely likely that where a conflict occurred he would prefer that custom which was most common and therefore,

[1] For other views as to its origin reference has been made on p. 3.

possibly, most reasonable. But it is improbable that his excursions in comparative jurisprudence went much further. Again, it is true that in the end the simple principles of the *jus gentium* came to be adopted for citizens also, but it is unlikely that the critical moment was the time of the conquest of Greece ; since, so far from the Romans at once accepting the philosophy of Greece, it was at first the object of extreme dislike. In the year 161 B.C. its teachers were expelled from the city, and Stoicism gained no definite hold upon the Romans until about the time of Scaevola, who was consul in the year 95 B.C.[1] The truth would seem to be that even at a comparatively early period the *Praetor Urbanus* adopted some, at any rate, of the principles of the *jus gentium*, because of their intrinsic reasonableness and simplicity, a thing he would have the less difficulty in doing after the *lex Aebutia*, since from that time the old system of *legis actio* was gradually replaced by another method of procedure—the formulary system, which gave the praetor the greatest possible latitude in administering justice. In the end, doubtless, the triumph of the *jus gentium* over the ancient narrow code of Rome was completed by the identification of the *jus gentium* with the *jus naturale* of Stoic philosophy, but probably the influence of Stoicism is rather to be traced in the writings of the jurists who completed the work the praetors had begun than in the edicts of the praetors themselves.

As regards procedure, the *Praetor Peregrinus* could not use the *legis actiones* ; he accordingly invented the formulary system, which was in effect as close an imitation of that system as was possible. He pre-

[1] Cf. Moyle, p. 37.

served the sharp distinction into proceedings *in jure* (before the praetor) and *in judicio* (before the judge), but in the former he permitted the parties to state the substance of their quarrel quite informally, instead of formulating their claim in set words accompanied by certain formal acts, as was the case under the *legis actio* system. From their statements the praetor would gather the issue, or the legal point actually involved, and then perhaps proceed to draw up his formula (or there might already be a suitable one set forth in the edict) containing the instructions for the *judex* who was ultimately to try the case. In constructing his formula the praetor had complete freedom: where, on the facts before him, no action lay at law, but justice demanded that the plaintiff should not be denied relief, the praetor was able so to mould the instructions to the *judex* who was to try the case as to ensure that justice should be done. He could grant an action if he thought fit, or refuse one where justice required it. In this way, through the instrumentality of procedure, he proceeded to develop a new body of law eminently reasonable and readily expansible. The *Praetor Urbanus* could not fail to realise the inferiority of the law and the machinery he had to employ. To remedy this the *lex Aebutia*[1] probably allowed *cives* to proceed by formula, instead of by *legis actio* if they so desired, except in a few cases, but apart from trifling reservations the *legis actio* system itself was abolished by the *leges Juliae judiciariae* under Augustus. Prior to this some scope for development was afforded by the employment of fictions, *e.g.* that a peregrine was a

[1] This account of the *lex Aebutia* is taken from Sohm (Ledlie's translation), 3rd ed. p. 247.

Roman citizen, to bring him within the scope of some *lex*. With the general establishment of the formulary system of procedure the praetor began to extend the existing actions of the civil law to cover analogous cases, and to grant new actions where none lay at civil law, or to refuse one that lay at civil law where justice required it, or to allow it, but to defeat it by some equitable defence. Now law is simply a collection of rights, and the best test of a right is the existence of a remedy, *ubi remedium ibi jus*; and inasmuch as the praetor was able to devise remedies which had not before existed, it follows that he, necessarily, at the same time created new rights and, since law is made up of rights, new law. It is the edict and not the formula which is spoken of as the source of law by the writers of the *Institutes*, because it was in the edict that the principles upon which the formula would be drafted appeared.

It would be wrong to suppose that there was anything revolutionary in the reforms which the edict effected, or that any change was made until public opinion and professional feeling were ready for it. However anxious for reform any given praetor may have been, he was, after all, a member of a class, and subject to the influence of his fellows; and, in any case, any change in the edict was of an experimental character, and where it proved unsatisfactory it could be dropped by his successor. Further, it can rarely have happened that the praetor, in drawing up his edict, acted entirely on his own responsibility. A large part of it custom required him to adopt from his predecessors (*tralatitium*), and such novelties as it contained were in most cases probably only adopted after consultation with some of the trained jurists.

Finally, although the *lex Cornelia*, 67 B.C., was passed to prohibit a departure by the praetor from his *edictum perpetuum*, such action had always been looked upon as unconstitutional.

Mr. Bagehot has remarked that for a society to win in the struggle for existence two things are necessary ; of which the first is, that it shall acquire a legal fibre, a *jus strictum*, some set of rules, however elementary, to give it cohesion and strength. This requirement the Romans satisfied when the Law of the XII Tables put into writing, and so made more rigid, the already fixed customary law of the people. The other requirement, the same author says, is that when this law has become too rigid and too elementary for its possessor, owing to the increasing complexities of civilised life, some method of escape shall be found, so that what was rigid may become elastic, what was primitive may be levelled up to meet more advanced wants. This means of escape the Romans found to some extent, as will be seen later, in the *interpretatio* put upon the XII Tables by the pontiffs and the earlier jurists, but infinitely more in the work of the praetors, to whom they owed the growth of a second set of legal institutions founded largely, but by no means exclusively, upon the *jus gentium*, which grew up side by side with and reacted upon the rules of the older civil law.[1] Thus we find the idea of *cognatio*, *i.e.* blood-relationship, growing up side by side with the old agnatic,

[1] To this so-called 'duplication of institutions' a parallel exists arising out of the early conflict between the patricians and the *plebs*; the marriage of a patrician, *e.g.*, was performed by *confarreatio*, that of a plebeian by *coemptio* or *usus*, and it is possible that the will *per aes et libram* was originally for plebeians, as opposed to the patrician's *testamentum calatis comitiis*.

or civil relationship, and in time almost superseding it as a title to the succession of property upon death; 'natural' titles to property, parallel with the *jus civile*, 'civil' titles; the growth of the idea of possession to be protected as such, *i.e.* whether incident to the civil law ownership or not; the *bonorum possessor* as distinguished from the civil law heir; and, most important of all, a large body of 'contract' law evolved to meet the wants of a people whose commerce was always increasing, but whose own narrow code supplied no adequate rules to decide the complex questions arising therefrom.

This new body of law, *jus honorarium*, was practically complete towards the end of the last century of the Republic, but even had this not been the case, there was not much scope for improvement so far as the Praetorian Edict was concerned. The edict owed its strength to the *imperium* of the ancient republican magistrates, and the Emperors, as their power grew, naturally became jealous of anything which seemed to compete with it. The *lex Cornelia*, 67 B.C., already mentioned, made unlawful any departure from the edict once issued; a series of *S.CC.*, in effect, prescribed the contents of the edicts of several successive praetors, and by virtue of his *jus intercedendi* the Emperor could disallow any reform of which he disapproved. The result was, as Sohm points out, that the edict became 'stereotyped and barren,' and Hadrian accordingly determined that the time had come to prescribe the contents of the edicts of the praetor for all time.[1] He accordingly commissioned Salvius Julianus to go through and codify the edicts of the *Praetor Urbanus*, the *Praetor Peregrinus*, and

[1] Sohm, p. 84.

certain parts of the edicts of the Curule Aediles, together with the edicts of the Provincial Governors. Julian's work was one of consolidation and rearrangement. In the Urban Edict he distributed the *formulae* of actions, hitherto contained in an appendix, under the edict or group of edicts to which they related. These in turn were followed by the *formulae* for civil actions having reference to the same subject-matter. The edict was divided into titles, which were subdivided according to their subject-matter. His task extended to the other edicts, with each of which he probably dealt separately. The resulting code, known as the *Edictum Hadrianum* or *Edictum Salvianum*, was ratified by a *senatus consultum* (*circa* A.D. 129), and thenceforth became an *Edictum Perpetuum* in a new sense—one intended to be of permanent obligation. Though the edict was still issued it was binding on the praetors, who could make no change in it. Henceforth, therefore, the improvement of Roman law could only be effected by other means; these were the writings of the later jurists, noticed below, and the Imperial Constitutions.

(6) *The Responsa prudentium.*—The jurists at Rome fall into three main classes:

I. The pontiffs and earlier lay jurists, whose chief work was *interpretatio.*

II. The jurists (called here for convenience the *veteres*), who came after the period of *interpretatio* and before the time of the classical jurisprudence.

III. The classical jurists.

I. *The interpretatio of the pontiffs.*

The close relation between law and religion, which seems characteristic of early society, renders easy of belief the fact that originally the knowledge and

practice of the law at Rome was entirely confined to the College of Pontiffs, who appointed one of their number every year to superintend disputes between citizens, *ex quibus* (*i.e.* the College) *constituebatur quis quoquo anno praeesset privatis*. It is, however, surprising that this monopoly should have continued for more than a hundred years after the publication of the XII Tables. Up to that time, of course, Roman law was nothing but unwritten custom, and that the sacred College should have treasured it orally is natural enough. But the promulgation of the XII Tables and the open manner of their application would seem to have precluded any further secrecy. The explanation of the difficulty probably is that it is one thing to know the principles of legal theory, another to apply them to concrete cases. Most laymen in England to-day, for example, know that it is a rule of English law that no citizen shall be imprisoned without legal justification; comparatively few know that this rule is enforced by a writ of *Habeas Corpus*; fewer still would be able to take the practical steps necessary to secure the release of a wrongfully imprisoned person. Further, it is impossible to imagine that Roman law remained for long exactly as defined within the limits of its early code; as a fact, it seems almost at once to have been amended and expanded, and the first means of reform is to be found in the 'interpretation' put upon the XII Tables by the Pontifical College.

When Gaius and Justinian speak of the jurists as the makers of law, they refer, as will be seen hereafter, to a much later class of lawyers in the time of the Empire, but as a fact these early pontifical lawyers are equally entitled to be considered as exercising

law-making power; since, though, in theory, they merely expounded the law as set out in the XII Tables, in fact, by the construction they placed upon this law, a considerable body of entirely new legal rules was evolved. Case law in England rests on much the same fiction. As Sir Henry Maine has shown, an English judge never admits that he is making law; he is merely applying known rules to different sets of circumstances; but whenever he determines a case to which no existing custom, statute, or precedent applies, he creates a new precedent which, save in the comparatively rare case of reversal on appeal, will be followed by other judges in the like circumstances, and so form new law.

It is instructive to consider in detail some of the ways in which this work of construction or interpretation was carried on, and two typical examples may be given.[1]

(*a*) *The mancipatio nummo uno.*—The earliest form of conveyance (*i.e.* means of making B the owner of what previously was A's property) at Rome was the *mancipatio*. This process, which applied to a very limited list of things called *res mancipi*, and originally only to the case of a ready-money sale, was as follows. Before five Roman citizens and a *libripens* (*i.e.* another citizen who was provided with weighing scales), B, the purchaser, grasping the thing to be transferred in his hand,[2] used a special set of words. Gaius gives us the wording where the object of the sale is a slave: '*Hunc ego hominem ex jure Quiritium meum esse aio isque mihi emptus esto hoc*

[1] See on the subject of *interpretatio* generally, Sohm, pp. 55-56.

[2] *Quia manu res capitur* (G. i. 122), hence the term *mancipatio*; but see Muirhead, 3rd ed. p. 56.

aere aeneaque libra' (I say this slave is mine by quiritary law, bought for me with this piece of copper and these bronze scales).[1] Then B, it would seem, placed the purchase money in the scales, at first uncoined copper (for the *mancipatio* goes back to the time when coined money did not exist), and it was weighed out by the *libripens*, and handed over to A, the vendor.

Coined money is said to have come into use at Rome at about the date of the XII Tables, and there would be no point in weighing it out in the manner the copper had necessarily been weighed. The XII Tables, however, enacted that the *mancipatio* should not transfer the ownership of the thing sold unless full payment were made or, at any rate, proper security were given. Accordingly after the XII Tables the *mancipatio* (the chief means of conveying property) was, as in its earliest stage, only applicable to making a purchaser owner on a sale for cash. In other words, there was no means of vesting property in another as a gift, or by way of mortgage, for safe custody or for any other purpose. This the pontifical *interpretatio* accomplished. By the law of the XII Tables the conveyance made by the *mancipatio* was to take effect solely as defined in the terms of the set speech made by B, the alienee.[2] The pontiffs held, therefore, that the terms of the statute were satisfied provided the parties to the *mancipatio* named, in the general declaration, some price, however small, and this were actually paid. Henceforth, therefore, the *mancipatio*

[1] G. i. 119.

[2] *Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto.*

became, as Gaius terms it, a fictitious sale (*imaginaria venditio*).[1] Suppose A wishes to sell a slave to B on credit. The five witnesses and the *libripens* are got together as before, B announces that he is buying the slave for a single *as*, he strikes the scales with it, hands it over to A, and the ownership has changed, the real price being paid at the subsequent date the parties have arranged. By this means the *interpretatio* of the early jurists departed from the spirit of the XII Tables while keeping within the letter of the law, and devised a method of conveyance applicable to every sort of transfer, since, obviously, the *mancipatio nummo uno* would be available not merely to make B owner on a sale by credit, but, for example, as a donee, in which case there would be nothing left outstanding after the *mancipatio*; or as a mortgagee, when B by the *mancipatio nummo uno* gets ownership of A's property as security for money he is lending to him, and undertakes by a *fiducia*, or declaration of trust, to make A owner again by a *remancipatio* when the money lent and interest have been repaid.

(*b*) *The emancipation of a filius.*—It would seem that at the date of the XII Tables there was no method by which a *paterfamilias* could, by his own act, release his son from his power (*patria potestas*). The XII Tables, however, probably by way of penalty, enacted that if a father sold his son three times as a slave the son was to be free from *potestas* (*si pater filium ter venum duit, filius a patre liber esto*). The jurists held that three wholly fictitious sales to a friendly purchaser satisfied this law, and on this

[1] It was obviously fictitious in a double sense, the weighing was unnecessary, and the whole price need not be paid.

construction the ceremony of emancipation (the voluntary freeing of a *filius*), as described by Gaius, was entirely based.

These two examples show exactly how the work of interpretation proceeded, and at the same time suggest its defects, viz. that it rested far too much on false assumptions or fictions, which, useful enough in reconciling people to needful though hardly welcomed improvements, obviously must have some limit. The development of the law, accordingly, by this method had come to a natural end by the time when the praetorian jurisdiction was sufficiently established to effect openly what had hitherto been carried out by *interpretatio*.

II. *The veteres.*

About the year 300 B.C. Appius Claudius Caecus (the Censor, who built the Appian aqueduct and commenced the great road known as the Via Appia), drew up a record of the formulae of the *legis actiones*, together with a list of the *dies fasti* and *nefasti* (days on which it was or was not lawful to begin a legal proceeding before the praetor), which Cnaeus Flavius, the son of a freedman, who acted as his secretary, is said to have stolen and published to the world in 304 B.C. as the *Jus Flavianum*. About fifty years later Tiberius Coruncanius, the first plebeian *pontifex maximus*, took to giving advice on legal questions publicly to any one who asked for it (*publice profiteri*). In the year 204 B.C. the legal formulae for actions were made public property for a second time by Sextus Aelius in the *Jus Aelianum*, together with the XII Tables and their *interpretatio*, and hence called *Tripertita* from the threefold nature of its contents. Henceforth, therefore, the monopoly of the pontiffs

was at an end, and a knowledge of the law was made possible for priest or layman, and so we get almost at once the school of the early lay jurists, the *veteres*, as opposed to the later ' classical ' lawyers.

The work of a Roman jurist of the period is summed up in four words : *scribere*, *agere*, *respondere*, *cavere*. *Scribere* probably denotes the drafting of legal documents (though Krüger thinks it means *written responsa*, *i.e.* advice given in particular cases) ; *agere*, the technical preparation of a suit for the *orator* (like our barrister) to argue in Court ; *respondere*, giving answers to questions on matters of law ; *cavere*, safeguarding the interests of a client in legal transactions. They made no charge, permitted students to attend their consultations, and seem to have enjoyed considerable prestige as a class. Many of them attained high office in the State. They may be regarded as starting the juristic literature which their successors, the classical jurists, brought to such perfection. The above-named Sextus Aelius (consul, 198 B.C.), M. Porcius Cato (consul, 195 B.C.), M. Manilius (consul, 149 B.C.), Cato the younger, M. Junius Brutus, and P. Rutilius Rufus (consul, 105 B.C.), were among the earliest lay jurists, but systematic legal writing cannot be regarded as definitely beginning until the time of Q. Mucius Scaevola (consul, 95 B.C.), whose work, the *Jus Civile*, in eighteen books, represents the first real attempt to set out the principles of Roman law in logical order and arrangement : *Jus civile primus constituit generatim in libros decem et octo redigendo.* Scaevola was followed by Aquilius Gallus (praetor, 66 B.C.), the author of the *Stipulatio Aquiliana* and the *exceptio doli*, or equitable defence of fraud, and Servius Sulpicius (consul, 51 B.C.), the

author of the first Commentary on the praetor's edict.[1]

Two important developments are to be found in the time of Augustus: first, the placing of the more distinguished jurists in a position of pre-eminence by means of the *jus respondendi*;[2] secondly, a division of the jurists themselves into rival schools—the Proculians, who had for their master Labeo, and the Sabinians, who were the followers of Capito. Whether the opposition is one of schools of thought or of rival teaching institutions is not clear, but it is quite certain that the schools did not exhibit the characteristics of their respective founders. The division lasted to the time of Gaius, who is usually spoken of as the last of the Sabinians. 'It is difficult', says Mr. Roby,[3] 'to trace any clear principle lying at the root of the division. Whether the succession was merely intellectual, or, as has been not improbably suggested, referred to the occupancy of professorial or other posts, is not known.' Karlowa's opinion, that the Proculians clung to the ancient forms of the *jus civile*, while the Sabinians preferred the modifications which the *jus gentium* and *jus naturale* suggested, is opposed to many of the records of the disputes between them. This scholastic division disappears after the time of Gaius.

III. *The period of classical jurisprudence.*

The classical period of Roman law is generally considered as beginning with the reign of Hadrian and ending with Modestinus about the middle of the third century A.D. But the list of classical jurists would not be complete without the inclusion of P. Juventius Celsus, who comes somewhat earlier.

[1] See further, Muirhead, 3rd ed. p. 237.

[2] *Vide infra.*

[3] Roby, i. p. 15.

Celsus, who was a Proculian, took part in a conspiracy against Domitian (A.D. 94), was praetor in 106, and consul in 129. His chief work was a *Digesta* in thirty-nine books. After Celsus come Salvius Julianus and Gaius in the time of the Antonines, the first of whom is known by his *Edictum Perpetuum*, and his *Digest* in ninety books, the latter chiefly by his *Institutes*, which for more than three centuries performed the same service for Roman law students as Blackstone's *Commentaries* did for successive generations of young English lawyers. They are followed by Q. Cervidius Scaevola, who had for his pupil Papinian, perhaps the greatest of all the Roman jurists, whose most important works were his *Responsa* (nineteen books) and *Quaestiones* (thirty-seven books). He was put to death by Caracalla.

Three other jurists remain to be mentioned. Domitius Ulpianus, a contemporary of Papinian, whose writings are represented in Justinian's *Digest* to a greater extent than any other jurist's;[1] Julius Paulus, who lived in the same period, and whose chief work was a commentary on the edict in eighty books; and Modestinus, a pupil of Ulpian's, who died after A.D. 244, and from whose writings there are three hundred and forty-four extracts in the *Digest*.

The period of classical jurisprudence, then, began early in the second century, reached its climax with Papinian, and ended abruptly in the middle of the third century; for after Modestinus the development of Roman law was carried on almost entirely by Imperial Constitutions.

The influence of classical jurists may be summed up as follows: their work was fourfold.

[1] About one-third of the *Digest* consists of extracts from Ulpian.

(1) After the *interpretatio* of the early pontifical lawyers had come to an end, the development of Roman law was carried on, as has been seen, mainly by means of the reforms effected by the praetor's edict; for although the *veteres jurisprudentes* undoubtedly did improve the law, it was probably less by their writings than by the indirect influence which they brought to bear upon the praetors. The growth of the Praetorian law, however, came to an end with the *Edictum Perpetuum* in Hadrian's time, and the first task of the later jurists was to take the law as stated in the edict, where it had grown up bit by bit, and reduce it to some sort of order and symmetry.

(2) The edict had resulted in a 'duplication of institutions'. A given transaction might be governed by one set of rules at *jus civile*, by another at *jus honorarium*. The classical jurists, to some extent, but by no means finally, reconciled these divergencies.

(3) The division of jurists into the schools of Proculians and Sabinians had given rise to many differences in points of detail. Here, again, the jurists did something by way of reconciliation, though some of the disputes were settled only by Justinian himself.

(4) The law contained in the edict was not final. Political reasons had rendered it impossible to effect further improvements in the law by its means, but there were new legal problems awaiting solution. These the jurists solved by what Sohm happily calls a new *interpretatio*. Just as, at an earlier date, the XII Tables had to be 'interpreted,' so now was it necessary to subject the Praetorian Edict to a similar process. And in the result, especially in the

domain of *obligations*, the classical jurists built up a body of law which, alike in substance and form, remains a model for all time.

Jus respondendi.

Under the Republic the jurists were in the habit of giving opinions (*responsa*) both on hypothetical cases put by their pupils and also when consulted by the litigants or the judge in actual litigation, for the judge during the formulary period was almost invariably a private citizen agreed upon by the parties, and without any special legal training. But although the *responsa* were sought and forthcoming, they were not authoritative; they had as much weight as, and no more than, that attaching to the opinion of an English barrister of to-day. If the jurist consulted were of great eminence and skill, and the facts had been properly stated to and grasped by him, his opinion probably represented the legal position, but only probably; for the judge was absolutely free to decide in the opposite sense if he thought right. The change came with Augustus, who instituted a practice which was continued by later Emperors, under which certain of the more distinguished were given a sort of privilege, called the *jus respondendi*, the effect of which was that if, after being consulted, a jurist invested with this peculiar right gave a written and sealed opinion, such opinion was to be deemed *ex auctoritate* of the Emperor.[1] According to one view this meant that the judge was bound to apply such *responsum* to the case before him. Others hold that the *responsa* of the jurists so honoured would necessarily carry *de facto* authority, but of *de jure* authority there is no hint. Augustus

[1] D. i. 2. 2. 49.

did not himself claim to bind the judge; if so, he could hardly authorise others to do so. The conferment of the privilege was merely a crafty move by Augustus to secure for the new régime the support of a class that enjoyed the high respect of the people. In the *Institutes*[1] we read that some Emperor had granted the *jus respondendi* to certain jurists. This apparently refers to Augustus. The passage then goes on to say that when these decisions and opinions were unanimous the judge was bound by them. This probably refers to the rescript of Hadrian mentioned by Gaius,[2] which appears to have first conferred binding force on the *responsa* where they were in agreement.[3] *Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est jura condere, quorum omnium si in unum sententiae concurrunt id quod ita sentiunt legis vicem obtinet: si vero dissentiunt judici licet quam velit sententiam sequi, idque rescripto divi Hadriani significatur.* (The *responsa* of the jurisconsults are the decisions and opinions of those privileged to lay down rules of law. If the opinions of all these be unanimous, their decision has the force of statute. But if they disagree, the judge is at liberty to follow which opinion he pleases, as the rescript of the late Emperor Hadrian provided.) The reply made to this is that Augustus did confer authority upon the privileged jurists to bind the judge, but did not provide for the possibility of conflicting *responsa*, and that Hadrian's rescript met this. Some difficulty is created by the words *sententiae et opiniones*, which some hold to include all the writings of the privileged jurists, though deceased, no less than

[1] J. i. 2. 8. [2] G. i. 7.

[3] See Buckland, pp. 23-26.

the *responsa* given in connection with the actual case under review; but this is not likely, as it was not till the later Empire that the works of the dead jurisconsults received statutory authority. The language of Gaius suggests that all the privileged jurists had to be consulted. This probably applies to those living at the time, of whom there could only have been a few. After Hadrian the *responsa* not only disposed of the case, but may have laid down a rule to be followed in future, as the words *jura condere* appear to suggest.

The practice of conferring the *jus respondendi* ceased after the close of the third century, and the classical jurists had come to an end with Modestinus in the middle of the same epoch. But though the great jurists were dead their works lived after them, and gradually the idea seems to have been evolved (probably about the time of Constantine) that the writings of a few of the greater jurists had a kind of special sanctity as 'quotable authorities', and the difficulty must have presented itself as to what was to be done when, as was often the case, they differed. A partial remedy was found by Constantine, who (A.D. 321) deprived of authority the notes of Paul and Ulpian on Papinian, so as to restore Papinian 'uncorrupted', and at the same time confirmed the authority of the *Sententiae* of Paulus. About a century later Theodosius II. and Valentinian III. devised a more effective expedient in the famous 'Law of Citations', A.D. 426, which introduced the system of a *majority* of votes. Authority was given to all the writings of Gaius, Ulpian, Paul, Papinian, and Modestinus (except the notes of Paul and Ulpian on Papinian), and jurists quoted and approved by them (provided their writings

could be verified by a comparison of manuscripts as a safeguard against corruption). The exact meaning of this provision is obscure. If they agreed, the *judex* was bound; if they differed unequally the majority decided; if they differed and were equally divided the opinion of Papinian was to prevail; if Papinian had not dealt with the matter the judge could use his discretion. The remedy had the merit of getting together a body of quotable authority at a time when this might have been becoming difficult owing to the multiplication of valueless writings by pettifogging lawyers, but the device of deciding cases by counting the opinions of deceased jurists bears eloquent testimony to the decay which had overtaken Roman jurisprudence.

Justinian's Codification

When the Emperor Justinian came to the throne (A.D. 527) Roman law was in almost as chaotic a state as the law of England is at the present day. There were, on the one hand, the various kinds of statute law (*Leges*, *Plebiscita*, *S.CC.*, and Constitutions), from the XII Tables downwards; on the other the edicts of the praetors and the whole mass of juristic literature.

There had, however, already been some attempts towards codification, for, as above pointed out, the Edict had been consolidated under Hadrian, and the Law of Citations had provided a body of juristic law of quotable authority. So, too, various attempts had been made to simplify statute law, of which the most important were—

(i.) The *Codex Gregorianus*, a private work which

was published about A.D. 300, and consisted of a collection of Imperial rescripts from the time of Hadrian to A.D. 294.

(ii.) The *Codex Hermogenianus* (of uncertain date, but somewhat later), which was another private collection of Imperial Constitutions down to A.D. 324, and to some extent overlapping the *Codex Gregorianus*.

(iii.) The *Codex Theodosianus*, which was published by Theodosius II. in A.D. 438, and contained the Constitutions of Constantine I. (A.D. 306-337) and his successors.

Almost immediately upon his accession Justinian conceived the idea of codifying the whole of Roman law in two great divisions—statute law (*lex*) and non-statute law (*jus*), and in A.D. 528 he gave instructions for the compilation of a work which should embody every existing statute. In theory, of course, it would be necessary, if such a task was to be adequately performed, to go through the laws passed by all the various legislative bodies at Rome from early times to the legislation of Justinian himself. In fact, all legislative enactments prior to the Imperial Constitutions would seem, by Justinian's time, either to have become obsolete or to have become embodied in later Imperial Constitutions or the writings of the jurists, and the *Codex* which resulted from Justinian's instructions was founded merely upon the three Codes already named, especially the *Codex Theodosianus*, and Imperial Constitutions passed since Theodosius (the 'post-Theodosian Novels'). The work was done by a commission of ten persons (including his great minister, Tribonian, and Theophilus, a professor of law at Constantinople, and they were authorised

by Justinian not only to omit what they considered superfluous but to reconcile laws which seemed inconsistent with one another, to remove obscurities, and to make such rearrangements of the text as the subject-matter required. The *Codex* was finished in the next year (A.D. 529), and thereupon received the legislative sanction of the Emperor, who abolished all preceding constitutions, whether considered singly or in any of the above-mentioned compilations; the aim, obviously, being that the *Codex Justinianus* should thenceforth be the *sole* source of Roman statute law for all time.

Justinian's next task was to systematise *jus*, which by this time meant nothing more than the writings of the jurists, who would seem to have embodied all the material parts of the early statute and edictal law into their own commentaries. Accordingly, in December A.D. 530, another commission of sixteen (with Tribonian at its head) was appointed, whose task was to be the reduction of juristic literature to order in a *Digest*, just as the statutes had been systematised in the *Code;* and since, in spite of the labours of the classical jurists, there were still differences of opinion between the jurists themselves, dating back to the old division into Proculians and Sabinians, Justinian as a preliminary measure had delivered what are termed the *Quinquaginta Decisiones* to settle such disputes. The *Digest* (or, as it is sometimes called, the *Pandects*) was published and became law in December A.D. 533. It was arranged in fifty books following the order of Julian's consolidation of the Edict, each book being subdivided into titles. The jurists from whose writings extracts are therein made are not confined to those mentioned in the Law of

Citations, but number thirty-nine; the writings of Ulpian and Paul together constitute about one-half of the entire work. Each extract is prefaced by the name of the author and the work from which it was taken. The compilers were given power, which they made full use of, to reconcile inconsistencies, to omit what had become obsolete, and generally to bring the law up to date.

The work was of such magnitude that its completion in so short a space gives ground for surprise. It has been conjectured from the order of the extracts in each title that it must have been the joint work of three sub-committees, one of which dealt with treatises on the civil law, called the Sabinian group from Ulpian on Sabinus; while the second dealt with those commentaries which made the Edict their text, called the Edictal group; and the third dealt with the works of Papinian and others who dealt with the same topics. In some titles there is a sort of appendix added as an afterthought. Probably each title was dealt with separately, and then the whole committee met and compared the work done, removing inconsistencies and eliminating repetitions; then instead of arranging all the extracts dealing with the same part of the subject together, the work of each sub-committee was preserved in a separate block, and arranged perhaps in the order of their relative importance. This theory as to the method of compilation is known as Bluhme's theory. Henceforth the *Digest* was to be the sole source of non-statute law, as the *Codex* was of legislative enactments, and, with this object, Justinian forbade the original works of the jurists even to be cited by way of explaining ambiguities in the text.

In the same year as the *Digest*, were published the *Institutes* of Justinian, drawn up, on his instructions, by Tribonian, Theophilus, and Dorotheus. The *Institutes* are founded upon the earlier work of Gaius, with the necessary omissions, and the incorporation of new matter to bring the book up to date. They were intended as an elementary work to introduce students to the principles of Roman private law, and to be studied as a preliminary to the more serious task of perusing the *Digest*.

By the time when the *Digest* and *Institutes* had been completed it was obvious that the *Codex*, published little more than four years earlier, was incomplete, since in the interval Justinian, besides the *Quinquaginta Decisiones* already referred to, had promulgated other new constitutions. Tribonian, therefore, was appointed to revise the Code, so as to bring it fully up to date, and at the end of the year A.D. 534 this new Code, known as the *Codex Repetitae Praelectionis*, was promulgated, and is the only Code which survives to the present day. Justinian seems to have laboured under the erroneous impression that the system he had framed would be adequate for all time. But as there is nothing static about law, further legislative enactments, termed *Novellae Constitutiones*, were issued during his reign. These were never officially collected, but exist in private collections.

In modern times Justinian's various compilations came to be called collectively the *Corpus Juris Civilis*: the *Corpus* being regarded as a single work, made up of the *Institutes*, the *Digest*, the *Codex Repetitae Praelectionis*, and the *Novels*.

The 'Institutes'

1. *Gaius.*

That a jurist called Gaius had, in the time of the Antonines, written an elementary text-book on Roman law was a fact always known to students of Roman law ; it was not, however, until the beginning of the nineteenth century that a copy of the work was discovered.

In the year 1816 the historian Niebuhr, who was visiting Verona, found in the library of the Cathedral Chapter a palimpsest manuscript which, upon examination, seemed to contain beneath certain writings of Saint Jerome, and in some places beneath other intermediate writing, a legal treatise. After consultation with Savigny, the conclusion was reached that the treatise in question was a copy of the *Institutes* of Gaius. In the following year the work of making a transcript was begun, and the result published in 1820.

The work so published was far from complete, partly because three folios were missing altogether, partly because much of the original copy of Gaius had been erased with pumice-stone when the surface was prepared for the works of St. Jerome. About one-tenth of the whole was wanting, but, as part could be supplied from Justinian's *Institutes*, only about one-thirteenth is now missing, one-half of which relates to the fourth book. Since the first edition of 1820 the patient labour of many distinguished German scholars has done much to purify the text, and an apograph (*i.e.* facsimile edition) of the Veronese manuscript was published by Studemund in 1874.

The exact date of the birth and death of Gaius are unknown. He himself mentions that he lived under

Hadrian (A.D. 117–138), and from the fact that he wrote a work upon an enactment of the Senate[1] passed under Commodus, it may be inferred that he survived to that Emperor's time. Internal evidence points to his *Institutes* having been written partly in the reign of Antoninus Pius (A.D. 138–161), partly in that of Marcus Aurelius (A.D. 161–180).

Of the personal affairs of Gaius there is very little record.[2] His family name (*cognomen*) and his gentile name (*nomen*) are both lost. 'Gaius', of course, is merely an individual name (*praenomen*). It was sometimes pronounced as if containing three syllables, sometimes as if containing two.

That he was a jurist, in the broad sense that he devoted his life to the law, is certain; and it is also beyond doubt that of the two Schools—the Sabinians and Proculians—he belonged to the former. He appears to have been a teacher of law, probably in the Greek provinces. Whether in his lifetime he enjoyed the *jus respondendi* is more than doubtful, but, at any rate, his writings were, many years after his death, given a pre-eminent place by Valentinian's Law of Citations. Besides his *Institutes* and his treatise on the *S.C. Orphitianum*, Gaius wrote many other works. He composed, for example, a treatise upon the *S.C. Tertullianum*, another entitled *Res Quotidianae*, others upon the *Edictum Urbicum* and the *Edictum Provinciale*, and commentaries on the works of Quintus Mucius and the XII Tables. He may have been the originator of the famous threefold division of the law into the Law of Persons, the Law of Things, and the Law of Actions, but it appears to

[1] The *S.C. Orphitianum*.

[2] For a full account see Roby, *Introduction to the Digest*, p. 174.

have been a traditional division employed in institutional treatises and popularised by him.

Justinian made the work of Gaius the basis of his own *Institutes*, which, like all elementary works for beginners, attempts a scientific arrangement which is generally discarded in the case of books for practitioners, like the *Digest*. We also owe to Gaius a large part of our knowledge of the history of Roman private law, for the instructional character of his *Institutes* is much enhanced by the historical treatment he adopts.

2. The general order of the *Institutes* is as follows :

All law is either public or private. Where both parties to a dispute before the Courts are ordinary citizens, a question of *private* law has arisen ; where either party is the State, or any branch of it, the question is one of *public* law. This distinction is expressed by Justinian : *Publicum jus est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet.*[1] The *Institutes* treat, in the main, of private rather than public law, though Justinian, unlike Gaius, in the last title of his fourth book, gives a brief account of public prosecutions (*de publicis judiciis*), which is part of *jus publicum*. Private law is divided, both in Gaius and Justinian, into the law which relates (1) to persons ; (2) to things ; (3) to actions. The *Digest* expressly refers this division to Gaius, but it may have been traditional. The exact meaning of the division has been much debated. One view is that its object was to divide the law into three masses merely on the ground of convenience of treatment, but the so-called *law* of persons is far from being exhaustive, and besides contains little mention

[1] J. i. 1. 4.

of rights and duties. It is mainly concerned with an enumeration of the commoner classes of persons within the Roman polity, and the various ways in which one became, or ceased to be, a member of these classes. Another view is that it is the law of status, by which is meant the law relating to those classes of persons whose rights and duties under the law differ in material particulars from those of the ordinary citizen. The same objection applies here: there is very little law in the so-called law of persons. We cannot do better than follow high authority [1] here and hold, with Theophilus, that it means that every rule of law has three aspects: the persons it affects, the subject-matter concerned, and the remedies provided. But though the law of persons really deals with persons, and not with their rights, it has become usual with text-book writers to treat of the rights and duties of such persons as well, and that course will be pursued here so far as it is consistent with the treatment to be expected in an elementary text-book. The *jus quod ad res pertinet* consists of the items of wealth, whether material like land, or notional like a debt, which belong to persons, together with how they are acquired, transferred, or lost; while the *jus quod ad actiones pertinet* is concerned with the remedies the law affords for the enforcement of rights. It cannot be claimed that Roman institutional writers carried out the above arrangement with strict regard to logic, but it appears to be what they meant in the main by their famous division which has left its mark on all discussions affecting the scientific arrangement of law.

[1] Buckland, p. 58.

PART I

THE LAW WHICH RELATES TO PERSONS

In all early systems we find greater inequalities among the nationals of a State, both social and legal, than is the case under the developed systems of to-day, the tendency of social progress being towards the elimination of inequalities, and the placing of the State's nationals upon a complete footing of equality as regards their political and legal rights. Accordingly, in Roman, as in early English law we find people grouped into a large number of classes, each distinguished from the others with respect to its position under the law. On the one hand we have the free-born (*ingenuus*) citizen (*civis*) of full age and complete capacity, who enjoyed the widest rights conceded to anyone under the law; on the other hand there was the slave distinguished by a negation of capacity as regards legal rights and duties. Between these two extremes we have a number of intermediate classes of persons, each with its distinguishing characteristics. It seems to have been the general intention of Gaius to give his pupils some account of the more usual of these, explaining how each arose and was determined. He was not concerned to give an account of the *law* concerning them, but his sole digression into law, in connection with the *tutela* (guardianship) of women,

misled Justinian's compilers into introducing a title on the *auctoritas* (authority) of tutors. Accordingly the *jus quod ad personas pertinet* is not the law of persons or of status as Austin conceived it. Neither is it the law of the family, as Savigny maintained, though it must be admitted that the principal statuses treated of were those of dependence, *e.g.* the son in his father's *potestas* (power), the slave, the person *in mancipii causa* (civil bondage), and the like.

There were many classes of persons in the Roman world of whom Gaius makes no mention. The peregrine has no interest for him. It is rather with the Roman citizen that he is concerned, and if he treats of these mainly from the aspect of dependence, the reason may be that the normal citizen was too familiar a person to need mention, or that his position was implicitly considered in the explicit treatment accorded to the classes under disability. Not many classes of persons are mentioned ; many of the less important are not mentioned at all, probably because Gaius was dealing with students in an elementary course of lectures. Gaius seems to be primarily concerned in his exposition with the ordinary *civis*, and with those classes of persons who could become such, and the ways in which it was possible for them to do so. His concern with slaves and the various classes of Latins, who were favoured peregrines, in that it was open to them to achieve Roman citizenship in a variety of ways by their own efforts, is confined to this point of view.

As Book I. of both Gaius and Justinian's *Institutes* deals with the so-called law relating to persons, it becomes necessary to get a clear conception of what is meant by a person in law. Here it is important for

the beginner to grasp clearly the truth, that there is nothing static about rules of law and the legal conceptions they enshrine. Here, as elsewhere, we are faced with constant change. A legal conception that is true at one period of legal development may have undergone profound change in succeeding periods. Every age has a morality of its own, and problems of its own to solve caused by social development, and law is but the legal clothing of society, mirroring the current morality of the age, and changing both as to its rules and its conceptions with the society itself. It follows that the legal conception of a person is bound to vary from age to age. Modern legal systems clothe with personality whatever, whether a human being, or group of such, like the colleges of Cambridge University, or in some systems, but not our own, a mere institution or foundation like a church, or even an animal or an idol, is recognised as the bearer of rights or bound by legal duties. But this conception of legal personality is certainly later than the *Corpus Juris* of Justinian. For both Gaius and Justinian the term 'person' was used in the untechnical sense of *homo* or human being. Thus the slave under Roman law would be a person, and is indeed spoken of as such, but as he had neither rights nor duties under the law, he would not be a person according to the modern legal meaning of that term. But as with the Romans the term *res* meant any item which went to make up the sum of a man's wealth, a slave being such an item would certainly be a *res*; so from the point of view of the Law of Persons the slave is a person, but from the point of view of the Law of Things the slave is certainly a thing.

Gaius deals with 'persons' from the following standpoints:

I. *Libertas.*—Is the individual in question a freeman or a slave? Freemen might be *ingenui* (born free), or *libertini* (made free). The latter might be either *cives*, Junian Latins or Dediticians. There were no degrees of slavery.

II. *Civitas.*—Is he, if free, a citizen or a peregrine? *Peregrini* might be the subjects of other States, provincial non-citizen subjects of Rome, or Romans who had forfeited citizenship while retaining their freedom.

III. *Familia.*—Is he, if a citizen, *sui juris*, that is, not subject to any family head, or *alieni juris*, subject to such control? The former might be completely free from all control, or subject to some sort of control other than that of a family head, *e.g. pupilli*, subject to *tutela* (guardianship) on account of their tender years or their sex (*tutela mulierum*); persons under disability, *e.g.* the lunatic and the interdicted prodigal, and therefore *in cura* (under the care of curators, a species of guardian); or *adolescentes* (minors, between fourteen and twenty-five years of age), also under a special form of *cura*, owing to youthful inexperience. Persons *alieni juris* might be those *in patria potestate* (in paternal power), or *in manu mariti* (women under the control of their husbands), or free persons *in causa mancipii* (in civil bondage).

Under Justinian we note the following changes:

I. *Libertas.*—The division of *libertini* into three classes, *cives*, *Latini*, and *Deditícii*, had practically become obsolete and was abolished by Justinian.

II. *Civitas.*—After the Edict of Caracalla, A.D. 212, which conferred *civitas* (citizenship) upon various

classes of non-citizen subjects of Rome, the importance of the distinction between *cives* and *peregrini* lost its practical importance.

III. *Familia.—Tutela mulierum* (the guardianship of women) disappeared before the end of the third century A.D.; the status of women *in manu mariti* and that of persons *in mancipii causa* had become obsolete. Though *patria potestas* continued to be a living reality, the wide powers originally included in its scope had been abolished as to some, and circumscribed as to others, so as to make it a tolerable institution.

The general result to be noted is that under Justinian there were fewer classes of persons than under Gaius, a fact which exhibits a permanent tendency of social progress which aims at putting all a State's nationals, as far as possible, on a complete footing of equality as regards legal rights. This is what Sir Henry Maine means by saying that the progress of society is from status to contract,[1] for in early societies people are determined by law into classes, each with its distinctive rights and duties which may not be varied by agreement, whereas in a modern society the number of such classes is at a minimum, and the ordinary citizen is free to alter his legal position by express contract. The slave gives place to the servant; the *tutela* of women of full age disappears; the incidence of *patria potestas* becomes of small moment. This does not, however, mean that status is entirely replaceable by a contract system, and that it is merely a matter of time when this consummation will be reached; for the whole question is governed by considerations of policy, and

[1] Maine, *Ancient Law*, chap. v.

accordingly such statuses as infancy and marriage cannot fail to be determined by the general law, in the interests of the society as a whole.

Section I. Libertas

Under this head must be considered—

1. The nature of slavery.
2. The causes of slavery :
   - A. *Jure gentium* (by the law of nations) ; and
   - B. *Jure civili* (by the civil law).
3. The termination of slavery, by
   - A. Manumission.
   - B. Methods other than manumission.
4. The legal condition of a slave.
5. Restrictions on manumission.
6. Justinian's changes in the law relating to *libertas*.

1. *The nature of slavery.*

Slavery is defined by Justinian [1] as an institution of the *jus gentium* in which one person, contrary to nature, is subjected to the *dominium* (ownership) of another. This seems to suggest that every slave must have an owner, whereas there were slaves who were not owned, *e.g. servi poenae* (slaves of punishment) and slaves of the *Fiscus* (Imperial treasury), which was not regarded as a person in law at that time. There were other cases. Accordingly slavery, it has been contended, is a condition of rightlessness. But there seem to have been instances under the later

[1] Inst. i. 3. 2.

classical law, after the time of Antoninus Pius (A.D. 138–161), when the slave could get the protection of the law. The suggested definition misses the Roman point of view, which does not require every slave to be owned, but merely indicates the slave as the one human being who can be owned.[1] It is true, however, that, generally speaking, a slave was both rightless and dutiless in law, but the slave was personally liable for crimes and civil wrongs (delicts), but in the latter case this meant very little as long as he continued a slave.

2. *The causes of slavery.*

A. *Jure gentium.*—(i.) A slave is primarily a captured foreign enemy,[2] who was saved by his captors from the death penalty they could inflict, in order to serve them. The captives became the property of the State and were commonly sold to private owners. The effect of such capture was to suspend all the rights of the captive, but these could, in general, revive by the doctrine of *postliminium* in the case of a Roman who had been captured fighting bravely, and who returned to Roman soil, having effected his escape, or having been fully redeemed, from the moment of such return. If he died in captivity he was presumed to have died at the moment of capture. By this fiction of the *lex Cornelia*, his will, which would otherwise have been destroyed by enslavement, stood good. (ii.) *Birth.* According to the *jus gentium* the condition of a child was entirely determined by the condition of the mother, irrespective of the condition of the father. Hence the children of an *ancilla* (female slave) were born slaves themselves. But later the rule was relaxed, and if the mother had

[1] Buckland, pp. 62-63. [2] G. i. 129.

been free at any time between conception and birth the child was to be free. Exceptionally, however, by the *S.C. Claudianum* a free woman could, by agreement with the owner of a slave with whom she was cohabiting, produce slave children, a rule which Hadrian abolished. Gaius tells us that by some *lex*, the name of which is not known, but assumed by some to be part of the same enactment, the children of a free man by an *ancilla*, whom he believed to be free, should be free in the case of males, and slaves in the case of females, till Vespasian repealed this.

B. *Jure civili.*—(i.) The *S.C. Claudianum* provided that a free woman who after prohibition cohabited with another's slave without the master's consent, if denounced three times, became by magisterial award, with her issue, his slaves, till Justinian abolished the rule. (ii.) By the XII Tables a manifest thief, if a free man, was reduced to slavery till the praetor introduced a milder penalty. (iii.) A *civis*, who evaded the *census* or his military duties, could be sold by the State as a slave, so long as the *census* continued. This was obsolete long before Justinian. (iv.) Insolvent debtors could, in early law, be sold into foreign slavery. (v.) A *libertus* (freed man) could be sold as a slave by his patron or recalled into slavery for gross ingratitude. (vi.) Persons condemned for crime to death, or to labour in the mines, or to fight wild beasts in the arena, became *servi poenae*, till Justinian abolished the rule that a convict became a slave. (vii.) If a free man over twenty years of age allowed himself to be sold collusively as a slave in order to share the price, the praetor would refuse to allow him to bring his *proclamatio in libertatem* (claim of liberty) and adjudge him to be a slave.

This was confirmed by a *senatusconsult*; but in later law he could recover his freedom by restoring the price. (viii.) Even under Justinian new-born children could be sold under pressure of poverty, but with a perpetual right of redemption.

3. *The termination of slavery.*

A. *Manumission*, or release of the slave from slavery by some act of the master. It converted the slave into a *civis*. With respect to his former master he was said to be a *libertus*, but with respect to others he was a *libertinus*. This took place (i.) *vindicta* (by a fictitious claim), or (ii.) *censu* (by enrolment on the census), or (iii.) *testamento* (by will), and is probably due to the appreciation of the fact that it was alike good policy and morally praiseworthy to free a slave who had deserved it.

(i.) *Vindicta.*—The proceedings which took place before the praetor, but not necessarily in Court, were as follows. The master and a friend who has agreed to be plaintiff in the proceedings and is called the *adsertor libertatis*, appear with the slave. The *adsertor*, holding a wand (*vindicta*—whence the name of the action), claims not that the slave ought to be freed, but that he is, *i.e.* always has been, a free man: '*Hunc ego hominem ex jure Quiritium liberum esse aio*' (I claim that this man is free according to the law of the *Quirites*), and thereupon touches him with the wand. The master does not resist the claim, and the praetor thereupon adjudges the slave to be free. Later the part of the *adsertor libertatis* is played by the praetor's *lictor*, and the master is released from all formal participation. Probably even before Justinian, and certainly under him, it was a valid *manumissio vindicta* if the master declared (before the praetor)

his intention to free the slave, no matter where, and even though done informally.

(ii.) *Census.*—The census was taken by the *censor* every fifth year to determine the position of citizens in the Servian centuries, and for the purposes of taxation. If the slave was enrolled by the *censor* with the consent of the master as a *civis*, it operated as a manumission. This method disappeared with the census itself under the Empire.

(iii.) *Testamento.*—Here freedom was bestowed by a declaration to that effect in the master's will, and this might be done directly (in which case the slave became *libertus orcinus*—the *libertus* of the deceased testator), or it might be done indirectly by directing the heir or legatee to free the slave, in which case he became the *libertus* of the heir or legatee who freed him. Here, unlike the two preceding cases, the manumission might be subject to a condition, that is, some event both future and uncertain, *e.g.* 'if he serves my heir faithfully for five years'; or *ex die*, from a future point of time which might be certain, *e.g.* 'five years after my death'; or uncertain, *e.g.* 'when Balbus shall die'. Here it is certain Balbus must die, but not certain when. The effect was the same as if it had been a condition. Till the condition was satisfied the slave was *statuliber*, but when the condition was satisfied he could not be deprived of his liberty by any act of the heir, *e.g.* a sale; and, in prospect of the liberty that was to be his, he was protected against harsh conditions, torture, and such treatment as could only be inflicted on slaves.

The above methods, which were the only methods in Cicero's time that converted a slave into a *civis*,

were known as *legitimae manumissiones*, and were only available to the quiritary owner. There were certain less formal modes of manumission, called *manumissiones minus solemnes*, which left the man a slave, but, by the intervention of the praetor, who refused to permit the master to exercise dominion over the slave, he was protected in the *de facto* enjoyment of his liberty and was said *in libertate esse*. These were (*a*) a manumission *inter amicos* (a declaration before witnesses); (*b*) *per epistulam* (by a letter of enfranchisement), or (*c*) *in convivio* (a declaration before guests assembled at a feast). A bonitary owner (one whose ownership was inferior to that of the quiritary owner) could only produce the same result, even when he employed formal methods of manumission. Persons *in libertate* were subsequently converted into Junian Latins. Another informal method (*in ecclesiis*) came in with Christianity, for masters commonly freed their slaves in church before the congregation. Constantine permitted this to confer *civitas* if it was attested in writing signed by the master.

B. *Methods other than manumission conferring liberty.*—(i.) *Postliminium.* (ii.) An edict of Claudius conferred liberty on a slave whose master abandoned him on account of age or infirmity. (iii.) By redemption in the case of a child sold as a slave when newly born. (iv.) One who became a slave by collusive sale could recover his freedom in later law by refunding the price. (v.) A slave of punishment, if pardoned, recovered his freedom, but if *restitutus* as well, he was restored to his original position in all respects. This does not exhaust the cases.[1]

[1] See Buckland, pp. 84 and 85.

4. *The legal condition of a slave.*

According to the *jus civile* a slave was a *res* or chattel. Like any other *res* he could be owned by one or by several masters, or one man might have a life interest (*usufruct*) in the slave, the ownership (*dominium*) being in another. Being a thing, the slave had no sort of right;[1] he could be killed or tortured at his master's caprice; he could own no sort of property, nor could he be regarded as capable of being legally bound by, or of legally binding others by, obligations. Some qualifications to this strict view, which, however, serve to show that even according to the civil law the slave was not absolutely on the same level with animals, are—

(i.) The fact that the master exercised *potestas* over him, for *potestas* is a term only applied in relation to human beings.

(ii.) The capacity the slave possessed of being made, by proper methods, a free man and a citizen.

(iii.) The fact that the slave could act as his master's agent, not in the modern sense that he could affect his master with liability, but in the sense that the master might benefit by acquiring proprietary rights through his slave, or by taking any profit there might be under his slave's contracts (*melior condicio nostra per servos fieri potest, deterior fieri non potest*).

(iv.) The child of an *ancilla* was not regarded as *fructus* (fruits) like the young of animals.

(v.) A slave could be instituted heir for the benefit of his master.

[1] *In servorum condicione nulla differentia est.* However much the social condition of slaves might differ, and there were great differences, *e.g.* between a favourite domestic slave and a *servus poenae*, all were alike in the eye of the law, and enjoyed merely the capacity to become free.

(vi.) Criminal liability attached to slaves.

In course of time this, the strict theory, became materially modified.

Though originally the master possessed absolute rights over his slave's body (*jus vitae necisque*), it is impossible to suppose that in early Rome these, or the minor rights they implied, were either generally exercised or abused. Slaves were few in number and corresponded rather to our domestic servants and farm labourers than to slaves in the modern sense, and they were probably well enough treated by their masters. But with the growth of Rome as a world power the treatment of slaves changed. During the late Republic and under the Empire the number of slaves became immensely increased, chiefly owing to the number of prisoners taken in war, and it was not at all uncommon in the time of Horace for an ordinary citizen to possess 200 slaves. Necessarily the old domestic relations disappeared and the increase of wealth and luxury, with the resulting corruption and cruelty, led to the abuse of the master's strict rights. Under the Empire, therefore, legislation was found necessary for the protection of slaves. By a *lex Petronia* (passed some time before A.D. 79) masters were forbidden to deliver their slaves to fight with wild beasts without a magistrate's order. By an edict of Claudius slaves whom their masters abandoned as old or infirm thereby acquired their freedom. Hadrian required the consent of the magistrate in all cases before death was inflicted. Where masters had been guilty of such excessive severity (*intolerabilis saevitia*) towards their slaves as to cause them to seek refuge in the temples or at the statues of the Emperor, Antoninus Pius required the magistrate, after an inquiry, to sell them

to some more considerate person, thus, in effect, permitting slaves to seek the protection of the law; and the same Emperor provided that the provisions of the *lex Cornelia de sicariis* (81 B.C.), which made the killing of a *servus alienus* homicide, should be extended to meet the case of a master who killed his own slave without cause (*qui sine causa servum suum occiderit, non minus puniri jubetur quam qui servum alienum occiderit*). Under Justinian the master was restricted to the infliction of reasonable chastisement only. But though the slave came thus to acquire immunity from being killed or grossly ill-treated, he could never personally assert such right or any other before the courts; for while it was recognised from quite early times that a slave might have a *peculium*, *i.e.* certain property or money, which he was allowed to enjoy personally, the enjoyment was *de facto* merely; for the *peculium* belonged, in law, like the slave himself, to the master, who could resume possession at any moment. The slave might be authorised by his master to employ the *peculium* in trade, the profits of course accruing to the master. Under the Empire this *peculium* was extended to earnings made by and gifts to the slave, who might so acquire considerable sums, the *peculium* remaining, like the earlier kind, in strict law the property of the master. But masters do not seem to have largely exercised their right to resume possession, and we find slaves purchasing their freedom from their masters with their *peculium*. On being freed a slave took his *peculium* in the absence of express agreement to the contrary. Subject to what may be called the slave's *moral* right to his *peculium*, everything the slave acquired he acquired for his master. Accordingly if on a sale, for example,

a horse or land is legally transferred to the slave of Maevius, the ownership at once vests in Maevius: *Item vobis adquiritur, quod servi vestri . . . nanciscuntur. . . . Hoc etiam vobis et ignorantibus et invitis obvenit.* And the principle is not confined to things transferred to the slave on a change of *ownership*, *e.g.* on a sale, but extends to things merely in his *possession*, so that if the possession ultimately ripens into *ownership* under the rules of *usucapio*,[1] the master benefits by the mere possession of his slave.

In the case where a slave belongs to one master by a bare legal title, to another *in bonis*, the latter alone profits. Further, if the master were entitled merely to a usufruct or life interest in the slave, only what the slave acquired by means of anything belonging to the master (*ex re nostra*) or by the slave's own labour (*ex operis suis*) belonged to the master.[2] So, *e.g.*, if Titius has a usufruct in a slave, and Maevius the *dominium*, and Balbus leaves the slave a legacy, Maevius takes and not Titius; for the legacy accrued to the slave neither by means of anything belonging to Titius nor by the labours of the slave.

A slave, being a human being, might, as a fact, make an agreement either with his master or some third person. In neither case did the agreement amount to a contract in the strict sense, because the slave could neither sue or be sued upon it; but—

(i.) If made with a third person, the latter incurred a civil obligation, which the slave's master could enforce, and so secure the benefit of the promise.

(ii.) The master, though not civilly liable on such

[1] *Infra.*

[2] The rule was the same with a *bona-fide serviens* and a *servus alienus* who the master thought was his own slave.

contract, was made liable by the praetor by means of an *actio adjectitiae qualitatis* where there was a *peculium*;[1] and

(iii.) In any case a slave's contract gave rise to 'natural' obligations, which, like our 'contracts of imperfect obligation', though not *enforceable by law*, were not without legal consequence. Suppose, *e.g.*, a master contracted an obligation with, resulting in a debt due to, his slave; the obligation to pay was *naturalis*, and could not be sued on. But if the master freed the slave and paid the debt, and, afterwards repenting, tried to get it back, the 'natural' obligation sufficed to defeat him if the slave took his *peculium*. And the case would be the same had the debt been contracted and paid by a third person.

With regard to civil wrongs or delicts, a slave might be wronged either by his master or by a third person. If by his master, he had no legal redress, though the State might, under the legislation already noticed, interfere and punish the master on his behalf. If the injury were the act of a third person, the slave, again, never himself had a remedy which he could personally enforce, the wrong was regarded as done to the master; so, for example, if it resulted in actual damage to the slave, the master could sue under the *lex Aquilia*;[2] if, on the other hand, the act were intended primarily as an insult to the master, he could sue by the *actio injuriarum*. That the wrong was wholly regarded as done to the master is shown by the fact that where a slave owned in common by two or more persons had suffered *injuria*, the damages were estimated, not according to the respective shares of the masters in the slave, but according to their

[1] P. 340. [2] P. 371.

respective positions (*ex dominorum persona quia ipsis fit injuria*). Finally, if the slave had been wilfully killed, the master could prosecute the offender under the *lex Cornelia de sicariis* ; a prosecution, as we have seen, to which the master himself was made liable, if he killed his slave without cause, by Antoninus Pius.

With regard to wrongs done by a slave, if to the master, no legal obligation arose, though the master might (subject to the protective legislation above noticed) take the law into his own hands. If the slave had wronged a third person, the master was bound to surrender him to the person wronged, or, alternatively, to pay the damages.

5. *Restrictions on manumission.*—(i.) We have seen that a bonitary owner could not manumit so as to make the slave legally free, till Justinian abolished the distinction between bonitary and quiritary ownership. (ii.) A woman *in tutela* (under guardianship) could not manumit without the consent of her tutor, as long as the institution of *tutela mulierum* survived. (iii.) A slave owned in common by two could not be freed by one till Justinian permitted this, compensation being paid to the other owner. (iv.) A slave in whom another had a *usufruct* (life interest), if freed by his master's will, did not gain his liberty till the usufruct ended. Justinian made him free, but he remained bound to the discharge of his duties towards the usufructuary, unless the usufructuary acquiesced in the manumission. There were other cases, the most important of which are as follows :

At the beginning of the Christian era three important enactments were passed with regard to manumission—the *lex Fufia Caninia*, 2 B.C. ; the *lex Aelia Sentia*, A.D. 4 ; and the *lex Junia Norbana*,

A.D. 19—of which the first two appeared distinctly retrogressive, in that they imposed restrictions on manumission when the general tendency of legal development is *in favorem libertatis*. Probably there were three main reasons for the legislation in question—

(*a*) The interest of the creditors of the master that valuable property (*i.e.* his slaves) should not be fraudulently put out of their reach (by manumission);

(*b*) Of the heir, where the manumission was by will;

(*c*) Of the State, which found in freed slaves a dangerous class of citizens.

The provisions of the most important of these laws—the *lex Aelia Sentia*—may be stated as follows:

1. All manumissions in fraud of creditors or of the patron of the manumitter were void, and a manumission was fraudulent where the master was either insolvent at the time or became so by the manumission itself. But—

(*a*) The manumission must not only as a fact cause loss to the creditors, the master, Justinian laid down, must also have a fraudulent intention; and

(*b*) Notwithstanding this or any other provision of the enactment, a testator who was insolvent could, by his will, institute one slave as his heir, at the same time giving him his freedom: *ut . . . creditores res hereditarias servi nomine vendant, nec injuria defunctus afficiatur.*[1]

2. A slave under thirty years of age could only be freed so as to become a *civis* by the proceeding *vindicta*, and then only after a good cause (*e.g.* valuable service rendered by the slave) had been shown before

[1] J. i. 6. 1.

a Council which, at Rome, was composed of five *equites* (knights) and five senators, in the provinces of twenty *recuperatores*. A slave under thirty manumitted by will or informally became a person *in libertate* merely, but after the *lex Junia* he became a Junian Latin.

3. A master under twenty years of age could only manumit his slaves in a similar manner; *i.e.* by *vindicta*, after good cause shown to the Council (*causae probatio*). Manumission by such a master in any other manner was void.

4. Slaves who before manumission had been subjected to degrading punishment (*e.g.* had been branded or made to fight in the arena) were given, on manumission, a special status, viz. that of enemies surrendered at discretion (*dediticii*). A *dediticius* though free and not a slave, had none of the rights of a citizen, could never under any circumstances better his position (*e.g.* become a citizen), and was not allowed to live within 100 miles of Rome. If he broke this last provision he became a slave again, and could never be subsequently freed, so as even to become a *dediticius: pessima itaque libertas eorum est.*[1]

5. A means was provided by which a slave who had been manumitted before the age of thirty otherwise than by *vindicta* after *causae probatio* could become a Roman citizen. This is sometimes called *anniculi probatio*, and was as follows: If a slave so imperfectly manumitted, married a woman who was a *civis*, or a Latin colonist, or of the same class as himself, in the presence of seven Roman citizens of full age, and a son was born of the marriage,

[1] Gaius, i. 26.

who attained the age of one year (*anniculus*), then on proof of these facts to the praetor at Rome, or the governor in the provinces, the ex-slave, his wife (if not already a citizen), and the child [1] all become Roman citizens.

The previous law of the series, the *lex Fufia Caninia*, 2 B.C., was passed to prevent excessive manumission of slaves by *will*, it having become common for testators to set free inordinate numbers of their slaves in order to secure their presence, as living witnesses to their kindness, at their funeral. The actual numbers are unimportant: the owner of from two to ten slaves might only manumit half; of ten to thirty, one-third; and so on. The slaves to be manumitted had to be expressly named, and in no case might the number exceed one hundred.

The last law of the series, the *lex Junia Norbana*, 19 A.D.,[2] created, like the *lex Aelia Sentia*, a new status. At the date when it was passed, manumitted persons (apart from *dediticii*) were of two kinds, either free citizens, *i.e.* if manumitted by a *manumissio solemnis*, and in compliance with the *lex Aelia Sentia*, or *in libertate*, *i.e. de jure* slaves still, but protected by the praetor; such were—

(*a*) Persons manumitted by a *manumissio minus solemnis*, *e.g. inter amicos*.

(*b*) Persons manumitted by a master who was only equitable owner (*in bonis*); and

(*c*) Slaves manumitted under the age of thirty, otherwise than by *vindicta*, after *causae probatio*.

Upon all these persons, hitherto only *in libertate*, a new and definite status was conferred; they were

[1] Exceptionally the child might be already a citizen (G. i. 30).

[2] The date is not certainly known.

henceforth to be known as *Latini Juniani*, their position being based upon *Latinitas*, a status which had been enjoyed by certain Latin colonists. A *Latinus Junianus* had no public rights, nor had he the *connubium*.[1] But he had part of the *commercium*,[2] *i.e.* he could acquire proprietary and other rights *inter vivos*, but not *mortis causâ*. A *Latinus Junianus*, therefore, could neither take under a will (save by way of *fideicommissum* [3]) nor could he make one, and so on his death all his property devolved upon his late master (or 'patron'), just as if he had always been a slave: *ipso ultimo spiritu simul animam atque libertatem amittebant*. But, subject to these disabilities, a *Latinus Junianus* was a free man, and his children, though not, like the children of citizens, under his *potestas*, were free-born citizens. A *Latinus Junianus*, unlike a *Dediticius*, could improve his position and become a citizen in many ways, of which the following are examples:

(*a*) *Iteratio*, *i.e.* the first manumission being defective, being freed again in a strictly legal manner.

(*b*) By imperial decree.

(*c*) By the *anniculi probatio* of the *lex Aelia Sentia*; a method which, though confined by that law to slaves under thirty who had been imperfectly freed, was afterwards extended to all those persons who before 19 A.D. had been known as *in libertate*, and who afterwards became *Latini Juniani*.

(*d*) *Erroris causae probatio*, *i.e.* a *Latinus Junianus* meaning to avail himself of the *anniculi probatio* method, marries a *peregrina* by mistake. On proof of the mistake, the marriage and the year-old child, he

[1] *I.e.* the right to contract a marriage, giving rise to *patria potestas* over the children. [2] See p. 75. [3] P. 255.

can take advantage of the provision of the *lex Aelia Sentia* where the mistake is a reasonable one.[1]

(*e*) If a woman, by bearing three children.

(*f*) By service in the night watch; by building a ship and importing corn for six years; by erecting a building costing half a considerable patrimony (G. i. 33); by working a mill with a certain output for three years.

After the *lex Junia Norbana*, we find the following classes of persons, under the division of the law of persons into free men or slaves:

1. *Ingenui*, or persons born free.

2. *Libertini* (or *Liberti*), *i.e.* ex-slaves who, on gaining their freedom, became *cives*.

3. *Latini Juniani* (before A.D. 19 *in libertate*), *i.e.* ex-slaves who, on manumission and by reason of some defect therein, became something short of full citizens.

4. *Dediticii*, *i.e.* ex-slaves who, having suffered ignominious punishment for crime, on manumission became, under the *lex Aelia Sentia*, the possessors of *pessima libertas*.

5. Slaves proper. The position of the third, fourth, and fifth classes has been already described, the *ingenuus* is the citizen with full or normal rights, and therefore it merely remains to notice how the position of the *libertinus* differed from that of a man born free.[2]

It was chiefly[3] his duties and obligations with regard to his late master which distinguished a

[1] The principle of *erroris causae probatio* was applicable to other cases, *e.g.* a citizen marrying a Latin by mistake. See Gaius, i. 67.

[2] The children of *libertini* were *ingenui*.

[3] Originally a *libertinus* could not marry an *ingenua*, a restriction later cut down to a veto on marriage with a person of senatorial rank. Justinian abolished it altogether.

libertinus from an *ingenuus*. These obligations (which descended on the patron's death to his children) were of three kinds:

1. *Bona*, the patron had certain rights of intestate succession on the death of the freedman without issue.

2. *Obsequium*, the freedman was bound to treat his late master with the same respect as a child his parent; he could not bring any action against him without the praetor's permission. If his patron or patron's family fell upon evil days, the freedman was bound to provide them with subsistence. As already seen, if the freedman were guilty of gross ingratitude (and bringing an *actio famosa*, even with consent, was classed as such), he could be *in servitudinem revocatus* (recalled into slavery).

3. *Operae*, the freedman was under a moral duty to perform certain reasonable services (*operae officiales*) for his patron; a moral duty which was usually strengthened by an oath (*jurata promissio liberti*), taken by the freedman at the moment of manumission.

These *jura patronatus* the patron might lose by his own act, *e.g.* if without justification he brought a capital charge against the freedman, or by the act of the Emperor, who by a decree (*restitutio natalium*) might put the *libertinus* in the same position as an *ingenuus* both in relation to his patron and at public law (where he suffered from certain disabilities[1] which an *ingenuus* did not share). These public disabilities could also be removed by the Emperor granting the freedman the *jus anulorum aureorum*, but this had no effect on the patron's rights.

Justinian's changes in the law relating to *Libertas* were, mainly, as follows:

[1] He could not, *e.g.*, be a magistrate or a senator.

1. He abolished altogether the *Latini Juniani* and *Dediticii*, and made all manumitted slaves Roman citizens.

2. He entirely repealed the *lex Fufia Caninia*.

3. He repealed the provision of the *lex Aelia Sentia* with regard to the manumission of slaves under thirty years of age.

4. He retained the provision of the same *lex* that a master under twenty years of age could only manumit *vindicta* after *causae probatio*, but modified it so as to enable a master to manumit by *will* first at seventeen, and later, by a novel, at fourteen years of age.

5. The provision of the *lex Aelia Sentia* making manumission in fraud of creditors void was retained.

6. A slave instituted heir got his liberty by implication *ex ipsa scriptura institutionis*, whether his master was insolvent or not.

7. The distinction between quiritary and bonitary ownership was abolished.

8. A *manumissio solemnis* [1] was no longer requisite for a valid grant of freedom; practically any declaration of intention, however informally expressed, was sufficient.

9. By his 78th *Novel* Justinian gave *restitutio natalium* and the *jus anulorum aureorum* to all freedmen, but provided that this was not to affect the *jura patronatus* without the patron's consent; they thus became, save in relation to their patron, in exactly the same position as *ingenui*.

Before we leave the division of men as slaves or free, the position of the following persons in positions more or less akin to slavery requires notice:

1. *Statu liber* was a slave made free by will,

[1] Ante, p. 59.

but not until some condition had been fulfilled, *e.g.* 'Let my slave Maevius be free if he pays my *heres* 100 *aurei*.' Until it was fulfilled he was the slave of the testator's heir. If sold by the *heres* to a stranger, or if some third person got possession of the slave and subsequently acquired ownership by *usucapio*, the benefit of acquiring freedom when the condition was fulfilled nevertheless remained with the slave.

2. *Cliens* denotes a plebeian who, in early Rome, before the *plebs* had become part of the State, had attached himself to a patrician, who was called his *patronus*, and to whom he stood in much the same relationship as a *filiusfamilias* to his *pater*, but he was protected against too harsh an exercise of his patron's authority by a religious sanction merely: *patronus si clienti fraudem faxit sacer esto* (XII Tables).

3. *Coloni glebae adscripti* are the serfs of the later Empire;[1] they were in the eye of the law free and citizens, but they were inseparably attached to the soil (*glebae adscripti*); they could not leave it without their lord's consent, and were in many respects like ordinary slaves: *licet condicione videantur ingenui, servi tamen terrae ipsius, cui nati sunt, existimentur.*[2]

4. *Bona-fide serviens* is the free man who acts as slave for a master under a genuine mistake as to his status; so long as he remains in this condition, everything he makes by his labour (*ex operis suis*), or by means of the goods of his supposed master, belongs to the master.

5. *Auctorati* were free men who hired themselves out as gladiators; they retained their freedom, but

[1] Sohm, p. 179.

[2] The term *colonus* is also used, in a wholly different sense, to denote a *free* person holding land under a contract of *locatio-conductio*.

were like slaves in that if they were enticed away from their hirer he could bring an *actio furti*.

6. *Redempti* were men who having been taken prisoners in war had regained their liberty on condition that ransom money was paid, and until this condition was fulfilled their ransomer was regarded as having a lien on them to secure payment.

7. *Judicati*, *nexi*; under the old law a man who suffered *manus injectio*, a form of arrest by way of legal process (*e.g.* because he was *judicatus*, *i.e.* condemned as a debtor by the Court, or *nexus*, *i.e.* liable on a contract to this process), might be adjudged (*addictus*) by the magistrate to the creditor, who at the end of sixty days, and after certain formalities, had the right to sell him as a slave *trans Tiberim*. After becoming *addictus* and before being sold, the status of such a person was a kind of *de facto* slavery, as is proved by the fact that he might be the object of *furtum* (theft), but *de jure* he remained a free man, and so might make a valid legal agreement with his creditor, *e.g.* to work off the debt by his labour.

8. *Persons in mancipii causa*, vide infra *Familia*.

Section II. Civitas

Though adopted by modern civilians, this division is not clearly made either by Gaius or Justinian. This, in the case of Justinian, is not strange, because in his time every subject of the Empire, unless a slave, was a citizen. But in the time of Gaius citizenship was still, to some extent, the cherished privilege of the Romans themselves, and there were very many *peregrini* occupying a status wholly different from

that of citizens of Rome ; it might have been expected, therefore, that Gaius, after stating that all men are either slaves or free, should have gone on : ' and, again, all men are either citizens or non-citizens '. In fact, however, Gaius only notices citizenship indirectly, *e.g.* in enumerating the various ways by which a *Latinus Junianus* might attain to the dignity, though it is with the citizen that he is really concerned.

In early Rome a man's public and private rights entirely depended upon whether he was a citizen or not, and even after the *peregrinus* had acquired some sort of position in the eye of the law by having his transactions regulated by the rules of *jus gentium* as administered by the *Praetor Peregrinus*, he still could not effect any single legal result by virtue of the rules of the civil law. The citizen, on the other hand, not only had the public rights implied by the *jus suffragii*, *i.e.* the right to vote, and the *jus honorum*, the right to hold public office (*e.g.* a magistracy), but he also possessed the *jus connubii*, the right to contract a marriage, giving rise to *patria potestas* over the issue, and the *jus commercii*, the right to have his legal relations (other than marriage) defined and sanctioned by the civil law, *e.g.* his capacity to acquire property, to make a contract, to make or take under a will.

Midway between the *civis* and the *peregrinus* was the Latin who was strictly a peregrine, but distinguished by the fact that he could in one way or another by his own efforts achieve Roman citizenship : these have already been considered. A peregrine could get it only by Imperial grant. There were three classes of Latins :

1. *Latini veteres*, or the inhabitants of those cities

that comprised the Latin league, who were soon absorbed into the body of the Roman people.

2. *Latini coloniarii*, who comprised colonies of Romans led out from Rome and induced by large grants of land to settle in the provinces; or Italian communities on whom the *jus Latii* was conferred as a mark of favour. They enjoyed merely the *jus commercii*. At the end of the Social War all such communities in Italy were given full *civitas*, but various communities outside Italy continued to enjoy this privilege till Caracalla's edict caused its disappearance. If the community was of the type known as *majus Latium*, all its magistrates became Roman citizens, but if it was *minus Latium*, the town councillors, *decuriones*, were not within the privilege.

3. *Latini Juniani*, who had a purely legal status, enjoyed merely the *jus commercii inter vivos* as already noted. They were included in Caracalla's grant of Roman citizenship, but the class began to reform, *e.g.* where a manumission did not conform to the requirements of the *lex Aelia Sentia*. It was finally abolished by Justinian.

The importance of *civitas* began to decline when, under Marcus Aurelius, it became a mere question of purchase. An edict of Caracalla, of A.D. 212, probably inspired by the desire for an increased revenue, extended it to colonary Latins, probably also to existing Junian Latins, and to all *peregrini* subject to the rule of Rome, but *Dediticii* were excluded. The class of *Latini Juniani* began, however, to re-form until Justinian's abolition of both *Dediticii* and *Latini Juniani*, so that all free subjects of the Roman Empire were *ipso facto* citizens. The subjects of foreign States continued to be *peregrini*, and there were cases where citizens

had been deprived of their citizenship through deportation.

Section III. Familia[1]

This division of the law of persons is based upon all men being either *sui juris*, *i.e.* independent of the control of some other private person, or *alieni juris*, *i.e.* subject to such control or *potestas*. A slave, of course, is *alieni juris*, being under *dominica potestas*, but, since slavery has been discussed already under the division *Libertas*, the *Institutes* deal here only with free persons under *potestas*.

Inasmuch as the legal relationship known as *agnatio* is at the root of this branch of the law, it seems best to describe it before explaining the law of *familia* in detail.

The modern conception of kinship would have been described by the Romans as *cognatio*. It is the natural tie of *blood*. A man is 'related' to his brother, his sister, father, aunt, cousin, and so on, by this bond and no other, and perhaps its most important *legal* result is that the relationship may give rise to certain rights of succession on the death of such relative without leaving a valid will. At Rome, the relationship which the law recognises and, at first, exclusively recognises, is that which the Romans expressed by the term *agnatio*; a man's legal relatives are not his 'cognates' as such, but his 'agnates'.

[1] A man's *familia* is sometimes opposed to his *pecunia*. In this sense there is some ground for thinking that it included everything which he could sell by a mancipation, viz.: originally his children in power, his wife *in manu*, and free persons given him as bondsmen (*in mancipii causa*), as well as those objects which are specifically called *res mancipi* (p. 138).

Agnates are those persons who are regarded as related to each other, either because they are in the common potestas *of some ancestor, or because they would have been in such* potestas *were the ancestor still alive.*[1] Roman private law was based upon the idea that each family had a head; the head being the eldest living male ancestor. In his *potestas* were all his descendants through males; so that if the great-grandfather happened to be alive, a grandfather of sixty was as much a *filiusfamilias*, and as much subject to the control called *patria potestas*, as the youngest infant in the family in question. All persons subject to the *potestas* were *agnati* to each other, and they so remained even after the common ancestor had died. Since the only person who could exercise *potestas* was a male, and since most people were under *potestas* because born in *potestas*, the writers of the *Institutes* define agnates as *cognati per virilis sexus personas cognatione juncti, quasi a patre cognati* (*cognates*, related through persons of the male sex, that is, through their respective fathers), but this definition is inaccurate because, although *agnates* are primarily *cognates* traced through males, the agnatic household might be *artificially* diminished or increased. It would be diminished by the marriage of a daughter into another family, by the release (emancipation) by the ancestor of any descendant in power, and by the ancestor giving a descendant by adoption into another family. Conversely it would be increased by the accession of a woman who 'married into' the family, and a stranger brought into it by adoption or adrogation. Agnates, therefore, may be particularly described as (*a*) 'blood relations' (*cognati*),

[1] Cf. Maine, *Ancient Law*, p. 149.

traced solely through males, excluding such cognates as have left the family by emancipation or otherwise, and, in addition to these blood relations, (*b*) such persons, unrelated by blood, as have been brought artificially (by adoption or otherwise) into the family.[1] The test of agnation is subjection to a common *patria potestas*; those are agnates, who are under the same *potestas*, or who would have been so had the common head of the family been alive.

The law comprised under the division falls into three parts. The head of the family (*paterfamilias*) has control over—

1. Descendants through males[2] (*patria potestas*).
2. Free persons in the position of slaves (persons *in mancipii causa*).
3. His wife (*manus*).

The term *paterfamilias* is applied to every male who is *sui juris*, irrespective of age and whether he has or has not any children in power. No female could be the head of a Roman family or exercise *patria potestas*. The word *familia* is here used in its strict sense of the agnatic group comprising the *paterfamilias*, those children under his control, whether natural or adoptive, his wife where the marriage was creative of *manus*, his freebondmen (persons *in mancipii causa*), and his slaves. With the last two we are not here concerned.

[1] Other relationships known to the Romans need brief mention: *Gentilitas* was the relationship subsisting between members of the same *gens* or clan; the *gens* being an aggregate of agnatic families bearing a common name. The *gens* originally succeeded to a man's property upon his death intestate, and the failure of his *sui heredes* (family heirs) and, after the XII Tables, his 'nearest agnates'.

Affines, the *cognati* of each party to a marriage, were *affines* to the other party (cf. the English 'brother-in-law').

[2] This includes those taken in adoption.

Subsect. 1. Patria Potestas

Patria potestas may be considered in three aspects :

A. Its creation.
B. Its nature.
C. Its termination.

A. *Its origin.*

Patria potestas arises (i.) by *justae nuptiae*, (ii.) by legitimation, (iii.) by adoption, (iv.) by adrogation. Two other cases creative of *patria potestas* have already been noted, *anniculi probatio* and *erroris causae probatio.*

(i.) The children of a lawful marriage are in the *potestas* of their father (*in potestate nostra sunt liberi nostri quos ex justis nuptiis procreaverimus*),[1] provided that he himself was not a *filiusfamilias*, in which case the children fall under the same *potestas* as their father. And not only do the children of the marriage fall under *potestas*, but all remoter issue through males. Thus if Titius, not being subject to *potestas*, marries and begets a son A and a daughter B, both fall under his *potestas*. If A marries and begets children, these also are subject to Titius's power ; if B marries, these children do not come under the *potestas* of Titius but, if the marriage was *justae nuptiae*, under the *potestas* of her husband or the head of his family. If a woman not being subject to *potestas* or to *manus* bore children, they were, nevertheless, not regarded as in her *potestas* ; and therefore her family ended with herself (*mulier familiae suae et caput et finis est*). For the requisites for *justae nuptiae*, see *Manus, infra.*

(ii.) *Legitimation.—Aliquando autem evenit ut liberi*

[1] J. i. 9 *pr.*

quidem statim ut nati sunt, in potestate parentum non fiant, postea autem redigantur in potestatem (Sometimes it happens that children who when they are born do not at once fall under *patria potestas* are afterwards reduced under *potestas*).

Gaius is here referring to the cases already noted of *anniculi probatio* and *erroris causae probatio*, but these are not cases of legitimation, for the marriage was quite lawful, though not creative of *patria potestas*. Legitimation is a conception of Christianity introduced to meet the case of definitely illegitimate children, the product of concubinage, a permanent relation between man and woman, but falling short of marriage. It must be distinguished from mere illicit intercourse, to which the rules of legitimation did not apply.

(*a*) *Per subsequens matrimonium*.—Legitimation by the subsequent marriage of the parents seems to have been introduced by Constantine, the first Christian Emperor. In the developed law of Justinian three conditions were necessary: the marriage must have been possible when the child was conceived (and therefore the children of an incestuous marriage, or born in adultery, or born from the union of a citizen and a slave, would not have their position improved by a subsequent marriage between the parties), there must be a proper marriage settlement (*instrumentum dotis*), and the child must not object. The reason for this last requirement was that, being born out of wedlock, the child was *sui juris* and under no control, and therefore ought not to be brought under *potestas* and made *alieni juris* against his will. At first it was not allowed where there were legitimate children, but in the end this was permitted.

(*b*) *By Imperial rescript.*—Justinian provided that if legitimation *per subsequens matrimonium* were impossible (*e.g.* the mother were dead or already married to some person), and if there were no legitimate child, natural children might by a rescript, given either on the application of the father or after his death, be put in the same legal position as if born legitimate.

(*c*) *Oblatio curiae.*—Theodosius and Valentinian in A.D. 443 provided that citizens who had no legitimate children might, by making a natural son a *decurio* (member of the *curia* or order from which magistrates were chosen in provincial towns), or marrying such a daughter to a *decurio*, be succeeded by such children on intestacy. Justinian allowed such a child to pass under *potestas*, thus making it true legitimation, and even if there were legitimate children. The reason for this exceptional piece of legislation was that to be a member of a *curia* was a costly distinction, and that recruitment was not easy owing to the unwillingness of the citizens to bear the burden. Legitimation effected in this manner had, up to a certain point, the same effect as if made in the two ways before mentioned. The child, in all three cases, became legitimate, subject to *patria potestas*, and acquired the right of succeeding his father. But whereas children made legitimate by either of the two other methods entered their father's family for all purposes, and so got possible rights of succession to other members of the family, a child made legitimate by *oblatio curiae* acquired no succession rights to any member of the family save his own father.

(iii.) *Adoption.*—Both Gaius and Justinian use the word *adoptio* to include (*a*) the *adoptio* of a person

alieni juris, and (*b*) the *adrogation* of a person *sui juris*. Here the word is confined to the former.

(*a*) *Adoptio* proper was where a person under one *potestas* was given into another *potestas*. It therefore involved two acts: the extinction of the agnatic tie in relation to the original family,[1] and the creation of an agnatic tie in relation to the acquired family. Originally, no doubt, an adoption was regarded as impossible. Adoption is thought to have been first made feasible by reason of a construction put by the jurists upon the provision of the XII Tables which aimed merely at punishing callous fathers. This (as above stated) was to the effect that a father who sold his son as a slave three times should thereby for ever lose his *patria potestas* over such son, and is the basis of the first part of the ceremony of adoption as described by Gaius, which has for its object the breaking of the old agnatic tie, and succeeds in so doing by means of three solemn conveyances or sales and two lawsuits. The process is as follows: A, the natural father, procures the attendance of his son B (to be given in adoption), five Roman citizens above the age of puberty, a *libripens* (*i.e.* another citizen holding a pair of scales), and a friend C. C buys B from A for a nominal sum, using the appropriate words and forms. Thereupon B becomes in the position of a slave (*in mancipii causa*) to C. A, B, and C thereupon go before the praetor, A or someone on his behalf claims that B is really a free man, C does not deny it, and the praetor decides that B is free. In other words, C has manumitted B *vindicta*, and thereupon, since only three sales can destroy *patria*

[1] This was the only thing needed in emancipation (*infra*); hence the likeness in the proceedings in emancipation and the first part of adoption.

potestas over a son (though one is enough for a daughter or a grandson), B reverts into the *potestas* of A. Accordingly, the same sale and the same fictitious lawsuit are gone through a second time, and for a second time B, after being *in mancipii causa* to C, falls back into A's *potestas*; apparently a small result for so much trouble, for he was in A's *potestas ab initio*. Then for a third time B is sold to C, and for a third time stands to him *servi loco*, but the provision of the XII Tables has been called into operation, and A's *patria potestas*, the old agnatic tie not only between A and B, but between A and all the members of his family on the one hand, and B on the other, has disappeared for ever, and the first part of the ceremony of adoption is complete.

The object of the second half of the proceedings, viz., the creation of a new agnatic relation between B and D, the intended adopter, might have been attained by D claiming, in a fictitious suit, that B, whom C asserts is *in mancipii causa*, to him, is really D's *filius*, C making no defence; but usually C makes a mancipation or sale of B back again to A, his natural father, to whom B will now stand not as a son but *in mancipii causa*, and then by a fictitious lawsuit (*in jure cessio*) B, A making no defence, will be adjudged D's *filiusfamilias*. A person might be adopted as a son, or as a grandson, and attached to a son with his consent, or not so attached. One's own child or grandchild who had been given in adoption could be readopted, but this did not restore the original ties between him and other members of the family.

The effect of adoption was that the child broke away from its old family in every respect, in particular losing all right of intestate succession to the

natural father, but acquiring a new right of succession to the adoptive father, exactly as if he had been born into his family.

There were two important changes in adoption in Justinian's time.

1. As a matter of form all that was necessary was that the real father, the adoptive father, and the person to be adopted should go before the magistrate and make a declaration, which was thereupon entered on the *acta* (records) of the Court.

2. Justinian drew a distinction between *adoptio plena* and *adoptio minus plena*. *Adoptio plena* was only to take place when the adoption was by a natural ascendant, *e.g.* a maternal grandfather, and in such case the effect was as under the old law. In every other case the adoption was *minus plena*; the child, as a fact, passed into the physical control of the person adopting, but as a matter of law remained a member of its old agnatic family, and the only legal effect of such an adoption was that the child acquired a chance of intestate succession to the person making the adoption. Justinian was trying to guard against this sort of danger: suppose A has given his son B in adoption to C, who is a wealthy man; he naturally supposes that C will provide for B. So he distributes his own property by his will among his other children. After his death C capriciously emancipates B, who is thus left without resources. This danger would, of course, be remote where the adopter was a natural ascendant of the child adopted.

(*b*) *Adrogation*, which is an earlier institution than adoption proper, took place when a person who was *sui juris* became *alieni juris* by placing himself under the *potestas* of another citizen, and since this involved

the extinction of a Roman family, the proceedings took place originally in the *Comitia Calata*, presided over by the Pontifex Maximus. There (after a preliminary inquiry into the expediency of the act had been made by the pontiffs) the person making the adrogation, the person to be adrogated, and the citizens present were asked if they respectively consented to the adrogation. If they did, by the vote of the *Comitia* the person adrogated passed into the *potestas* of the person adrogating him, to whom he stood as a *filiusfamilias*, his own family with its *sacra* (religious rites) being destroyed. And there also passed with him into the new *potestas* his descendants (if any), and the whole of his property, *i.e.* all his corporeal property and his rights, save such purely personal rights [1] as were extinguished by the *capitis deminutio* [2] (change of status) which took place. With regard to obligations owed by the person adrogated there was a distinction; if due from him as heir of some third person deceased, they passed to and bound the person making the adrogation; if merely personal, they became extinguished altogether at strict law. Later the praetor gave creditors the right to be satisfied out of property which, but for the adrogation, would have belonged to the person adrogated (G. iii. 84).

After the *Comitia Curiata* decayed and the citizens were represented by thirty lictors, adrogation still took place there, and the proceedings were, even then, not purely formal, since a judicial inquiry was still held, and the consents of the parties were as necessary

[1] *E.g.* services due to him by a freedman. Formerly *ususfructus* and *usus* also, but Justinian amended the law in this respect.

[2] See p. 126.

as before. It was not until Diocletian that the form changed, when for the vote of the *Comitia* was substituted a *rescript* of the Emperor, a form which continued down to, and in the time of, Justinian himself. The only change made by that Emperor was that he reduced the interest of the person making the adrogation to a *life interest* (*usufruct*) merely in the property of the person adrogated.[1]

The purpose of adrogation was to keep alive a family which was in danger of failing through the lack of heirs. Hence only the childless could resort to it, and those who through age or some similar reason were not likely to have children. Only one person could be adrogated.

Originally since the act took place in the *Comitia*, adrogation could only be effected at Rome. A woman could neither adrogate nor be adrogated, for she could not appear before the *Comitia*, nor could an *impubes* be adrogated, a further reason for this last restriction being that a man might by adrogating a child one day and emancipating him the next, acquire and retain all his property without incurring any obligations in respect of him. When the vote of the *Comitia* was replaced by Imperial rescript, adrogation became possible in the provinces; under Diocletian it was recognised that women could be adrogated. The adrogation of an *impubes* was made possible, in particular cases, by special grace of the Emperor. Antoninus Pius generalised this under certain stringent conditions. Besides inquiring as to the age of the parties, the motives of the persons making the adro-

[1] As above stated, Gaius and Justinian use the word *adoptio* to cover both adrogation and *adoptio*. *Adoptio* in the strict sense they both refer to as *adoptio imperio magistratus*. Adrogation Gaius calls *adoptio populi auctoritate*, Justinian *principali rescripto*.

gation, the possible injury to his family, and the advantages to the other party (*Exquiritur causa adrogationis, an honesta sit expediatque pupillo*), the tutor's *auctoritas* (sanction) was necessary and certain further conditions had to be fulfilled (*cum quibusdam condicionibus adrogatio fit*), *i.e.*:

1. Liberty was reserved for the person adrogated to put an end to the adrogation, if he so wished, on attaining the age of puberty.

2. The adrogator gave security that if, with good cause, approved by the Court, he emancipated the *adrogatus* while *impubes*, or if *adrogatus* died under that age, he would restore the property in the one case to the *adrogatus*, in the other to his heirs.

3. Further, that if he disinherited him or emancipated him without showing cause approved by the Court, the *adrogatus* could, on the death of the adrogator, claim the return of his own property plus a quarter of that of the adrogator (called the *quarta Antonina*).

Some special cases of adoption.

1. *Adoption of one's own slave.*—Cato is said to have recorded that in ancient times a master could adopt his own slave. The exact machinery is not clear. One suggestion is that he sold him collusively to another, from whom he then claimed the slave as his son before the praetor. The objection is that this is really the adoption of a slave formerly one's own, but now another's. Another view is that it was effected by adrogation. It merely operated to free the slave, and was unknown in classical law. But Justinian provided that if a master had recorded in the *acta* of the Courts that a slave of his was his son, this was equivalent to a manumission *vindicta*.

2. *Giving one's slave in adoption.*—Gellius asserts that in ancient times this could legally be done. The form was that of a *cessio in jure* before the praetor (adoption proper). This was not permissible in later law. But the slave could be manumitted by his master, and then adrogated by the adrogator.

Adoptio and adrogation are alike in the following respects:

1. In each case (save in the *adoptio minus plena* of Justinian) a person changed his family.

2. On the principle *adoptio naturam imitatur* the adrogator or adopter had, under Justinian, to be at least eighteen years older than the other person, and could not adrogate or adopt if physically incapable of marriage. The fixing of the age limit was a matter of slow growth, for Cicero derides Clodius for having been taken in adrogation by a younger person. Gaius confesses to doubt upon the legality of such an adrogation; but by the time of Modestinus the rule is settled as we find it under Justinian.

3. Since *mulier caput et finis familiae est*, a woman could not adopt in either sense of the word, though, later, *ex indulgentia principis*,[1] a woman, as a solace for the loss of her own children, was allowed to 'quasi-adopt', though she did not thereby gain *patria potestas*.

The institutions differ—

1. Because in *adoptio* a person *alieni juris*, in adrogation a person *sui juris*, changed his family.

2. Not only the person adrogated, but his descendants also passed into the *potestas* of the adrogator.

3. So long as adrogation was *populi auctoritate*, it could only take place at Rome.

[1] Diocletian and Maximian.

4. Women, though they could always be adopted, could not be adrogated until the time of Diocletian.

5. An *impubes* could always be adopted, but could not be adrogated[1] until it was made possible, as above stated, by Antoninus Pius.

B. *The nature of patria potestas.*

Everywhere law gives the father certain rights and powers with respect to his children, but nowhere are they comparable with the Roman institution of *patria potestas*, whether in extent or in duration, which continued throughout life. It has two main aspects: (1) as regards the child's person, and (2) as regards its property.

(1) This included the power to expose the child to perish of cold and hunger; and though this was forbidden in A.D. 374, the practice was not completely discontinued. The father's power of life and death was not taken away till Constantine made the killing of a child parricide. In early law the father could sell his child as a slave *trans Tiberim*; this power was obsolete before the end of the Republic; but even under Justinian a father could sell his newly born children into slavery if he was too poor to rear them, but the right to redeem them on repayment of the price was reserved. Sale into civil bondage was obsolete before the end of the Republic, except the purely formal sales incidental to adoption and emancipation. Pledging children was prohibited by repeated Imperial legislation, and the noxal surrender of children for wrongs was obsolete long before Justinian as regards females, and prohibited by him as regards males. The power to divorce a child under *potestas*

[1] Save as a special privilege from the Emperor.

dwindled to a right to withhold consent to marriage. The power to appoint guardians by will, and to make, in effect, a will for the child if it survived the father, but died before it was old enough to make a will for itself, survived to the end.

(2) Originally a *filius* could own no property, because, like a slave, whatever he acquired he acquired for his *paterfamilias*. And until the Empire the only sort of property a *filius* had was the *peculium* (which came to be known as *peculium profecticium*), or property which his father allowed him the use of, but which the father might take back at any moment. In the early Empire a series of changes began, and a *filiusfamilias* came to acquire a distinct proprietary position. Augustus introduced the *peculium castrense*, which embraced whatever the *filius* acquired on military service. The *peculium* was withdrawn from the *potestas* of the *pater*, and the *filius* could dispose of it (just as if he were really *sui juris*) *inter vivos* and by will, though until the time of Hadrian to dispose of it by will the son had to be on active service. It was only if the son died in the lifetime of his father without having disposed of it by will that the father took the property as if it were his own (*jure peculii*). After Justinian's legislation, however, he took it by inheritance (*jure hereditario*). Under Constantine came the *peculium quasi-castrense* : whatever the son made in official employment was his own property, except that he could not dispose of it by will, a privilege only conferred by Justinian. Subsequently this *peculium* came to embrace everything the son earned in a professional capacity. Under Constantine also arose the *bona adventitia* ; everything which the *filius* acquired as heir to his mother (*bona materna*)

constituted this *peculium*, and the father was merely to have a life interest (*usufruct*) in it, the *dominium* or reversion remaining in the *filius*. Later this *peculium* was extended to cover all property coming to the *filius* through the maternal line (*bona materni generis*), and property gained through marriage (*lucra nuptialia*), and by Justinian to all property of every kind except the *peculium castrense* and *quasi-castrense*, and property (*peculium profecticium*) derived from the father himself (*ex re patris*). In the time of Constantine a father, on emancipating a *filius*, retained absolutely one-third of the *peculium adventicium*. Justinian altered the law ; the father was to take a life interest (*usufruct*) in half this *peculium*, and the *filius* accordingly got the income of the remaining half during the rest of the father's lifetime, and on the father's death *dominium* of the whole.

A contract between a *filiusfamilias* and his *pater* gave rise to a *natural* obligation merely. Unlike the case of a slave, however, a son's contract with a third person gave rise to a civil obligation (*i.e.* both the son and the third person were bound *civiliter*), though originally any benefit accruing under such a contract accrued to the *pater*, who could not be detrimentally affected by it. As a matter of fact, though in theory a *filius* could enter into as many legally binding contracts as he pleased, it is improbable that people would be willing to deal with him save in two cases : (i.) where he was contracting (as he might) on his own behalf in relation to the *peculia* which he acquired under the Empire ; (ii.) where the son was acting as his father's agent, and there was a reasonable prospect of making the father liable by means of an *actio adjectitiae qualitatis*.

A *filius* wronged by his father had (apart from express legislation protecting him) no legal redress. If wronged by a third person, it was normally the father and not the *filius* who could sue, though the *filius* could bring the *actio injuriarum* (for insult) and apply for the *interdictum quod vi aut clam* in his own name.

If the *filius* injured his father, the latter inflicted such punishment as he pleased, though in the later period of Roman law serious punishment could only be ordered by the magistrate. If the wrong was to a third person, originally, as in the case of a slave, the father was bound to give the son up as a quasi-slave (*in mancipii causa*) to the vengeance of the other person; very soon he was allowed the alternative of this *noxae deditio* or paying damages; and by the time of Papinian a son, even though given in *noxae deditio*, did not remain for ever, as formerly, *servi loco* to the person wronged, but only until he had 'worked off' by his labour the amount payable as compensation. Finally, Justinian abolished the noxal surrender altogether.

Besides being allowed to bring the *actio injuriarum* and the *interdictum quod vi aut clam*, the son could also in his own name sustain the *querela inofficiosi testamenti*, the *actio depositi*, and the *actio commodati*.[1] He was probably allowed other actions *in factum*; *e.g.* to enforce such contracts as he made by virtue of the independent proprietary position given him by the *peculium castrense* and the *peculium quasi-castrense*.

Patria potestas had no application to public law: *Quod ad jus publicum attinet non sequitur jus potestatis.*

[1] See Poste, pp. 41-43.

Thus a *filius* could vote, could hold public offices (such as a magistracy or a tutorship), and might even preside as a magistrate over his own adoption. The exclusion of public law from the incidents of *potestas*, coupled with the growth of the various *peculia*, the mitigation of the father's *jus vitae necisque*, and the fact that emancipation was always possible, probably account for the survival of *patria potestas* through the whole history of Roman law.

C. *Patria potestas terminated*—

(i.) By the death of either party, provided that, upon the death of the person in whose *potestas* the *filius* was, he did not fall under the power of some other ascendant; *e.g.* A, a grandfather, has in his *potestas* B his son and C his grandson by B. A dies, C is not *sui juris*, but falls under the *potestas* of his father B.

(ii.) By adoption, provided, in Justinian's time, that the *adoptio* were *plena*.

(iii.) In the case of females, by marriage *in manum* (so long as that system lasted) into another family.

(iv.) By the child attaining signal public distinction; *e.g.* in the time of Gaius becoming a *flamen dialis* or a vestal virgin, or, in the time of Justinian, a bishop or prefect.

(v.) In the later law a father exposing his children, or giving his daughter in prostitution, lost his rights over them.

(vi.) By either father or child becoming a slave [1] or losing *civitas*.

[1] But the rights of the father might revive by the fiction of *postliminium*.

(vii.) If the father gave himself in adrogation to another citizen, the last-mentioned acquired *patria potestas* over the children also (*supra*).

(viii.) The sale of the child *in mancipii causa*, but in the case of a son three sales were necessary.

(ix.) The most common case of all, emancipation or the voluntary freeing of the child by the father. This, in the time of Gaius, was effected as follows: The object, as in the first stage of adoption, being to put an end to the agnatic tie, the first part of the ceremony of emancipation is exactly like that in an adoption; *i.e.* the child (if a son) is sold by means of a fictitious mancipation three times to a stranger, being manumitted *vindicta* after the first and second sale. (If the child were not a son, but, *e.g.*, a daughter or grandson, one sale was enough.) The child is then *in mancipii causa* to the purchaser, and the second stage of emancipation is the freeing of the child from this quasi-slavery, so that he may not only escape from the *patria potestas* of his father, but become a freeman. Obviously this might have been effected simply, by the purchaser manumitting the child who was *servi loco* to him *vindicta*. But this was not the usual course, because in such case the purchaser, as *extraneus manumissor*, would acquire a right of succession to the child, which more properly belonged to the real father. The usual course, therefore, was for the third sale to be made under a trust (*fiducia*) that the purchaser would resell the child to the father, who would himself manumit him, and so, as *parens manumissor*, acquire the succession rights. The form of emancipation was first simplified by Anastasius, who allowed it to be effected by *Imperial rescript* (*emancipatio Anastasiana*), a course usually adopted

where the child was away from home, and so incapable of going through the ordinary ceremony. Finally, under Justinian, emancipation was effected by a declaration by the father and son in the presence of the magistrate (*emancipatio Justinianea*). In later law the consent of the child seems to have been required.

Subsect. 2. Persons 'in mancipii causa' or 'servorum loco'

It will be remembered that free persons *in mancipii causa* are included in the *familia*, and so we shall consider them next. This status might arise—

(i.) If, under the ancient law, a *paterfamilias* sold his son into slavery at Rome; if *trans Tiberim* he would seem to have been a *servus* proper, because the status *in mancipii causa* was peculiar to Rome.

(ii.) By being fictitiously sold as a slave during the process of adoption or emancipation.

(iii.) By being given up in *noxae deditio* by his *paterfamilias*.

(iv.) If a woman, by means of a fictitious sale by her coemptionator, *e.g.* as a preliminary to divorce (cf. G. i. 118; *vide infra*, *coemptio*).

The chief differences between a slave proper and a person in *mancipii causa* were—

(i.) That the latter retained, though in a latent form, full civic rights. (ii.) On being freed he became *ingenuus* and not *libertinus*. (iii.) Neither the *lex Aelia Sentia* nor the *lex Fufia Caninia* restricted the manumission of such a person. (iv.) In the time of Gaius a master who subjected a person *in mancipii*

causa to insulting treatment was liable to the *actio injuriarum*.

On the other hand, a person *in mancipii causa* was like a slave, because—

(i.) He was incapable of entering into legal obligations. (ii.) His acquisitions accrued to his master. (iii.) His children were probably in ancient times also quasi-slaves, though the law had become modified in this respect by the time of Gaius. (iv.) His master could alienate him as a quasi-slave to another either *inter vivos* or *mortis causa*, and could, if the person *in mancipii causa* were unlawfully taken away from him, reclaim him by a *vindicatio* (a *real* action) and, in a proper case, bring the *actio furti* (for theft); and (v.) to free him the same means were necessary as in the case of a *servus* proper.

In the time of Gaius this status seems only to have been important—(*a*) where the child had committed a delict and been given in noxal surrender; (*b*) in the formal sales incidental to adoption and emancipation. As Justinian made these unnecessary, and abolished noxal surrender, the status disappeared.

Subsect. 3. Manus. Justae Nuptiae

Manus was the relationship under the old law between husband and wife by virtue of which the wife on marriage left her old agnatic family and became a member of her husband's agnatic family, so as to pass under the power of the head of that family, thus standing to her husband, if he happened to be himself the head of his family, in the position of a daughter. *Manus*, therefore, being but an incident

of marriage, may conveniently be considered under that heading.

A. *Justae nuptiae—how created.*

For a marriage to amount to *justae nuptiae, i.e.* such a marriage as would give rise to *patria potestas* over the children and other issue through males of such marriage, the following conditions had to be satisfied :

(i.) Each party must have *connubium*, the capacity to contract civil marriage giving rise to *patria potestas* over the children, otherwise the marriage could at the best be but *matrimonium jure gentium*,[1] the children being legitimate but not *in potestate*. *Cives*, and those Latins and *peregrini* to whom it had been granted, alone had *connubium*. Where there was *connubium*, but marriage between the parties was barred, the *connubium* has been conveniently distinguished as relative. Such bars were—

(*a*) *Consanguinitas*, or blood relationship, marriage being prohibited within certain degrees.

(*b*) *Affinitas*, or marriage relationship, *e.g.* marriage with a daughter-in-law, or mother-in-law.

(*c*) *Adoptive relationship* ; *e.g.* marriage with an adopted daughter, even after the tie of adoption had been severed, or with a sister by adoption, but only during the continuance of the tie.

(*d*) On grounds of public policy ; *e.g.* a senator could not marry a freed woman or an actress, till Justinian

[1] The term *matrimonium juris gentium*, not found in the sources, has been used by modern civilians without justification to describe a union between a man and a woman who regarded themselves as husband and wife, but falling short in some respects of the requirements of *justae nuptiae*. For the whole subject see Professor Corbett's article in the *Law Quarterly Review* of July 1928.

set the example as regards the latter and permitted it; nor a Jew, a Christian; a tutor or curator, his ward; the governor of a province, a woman of his province.

In all the above cases a union between the parties would be a nullity. After Caracalla had bestowed *civitas*, which, of course, included *connubium*, on all free subjects of the Empire, this condition became of small importance.

(ii.) Each party must consent.

(iii.) If either party were *alieni juris*, the consent of the *paterfamilias* was necessary.

(iv.) Each must be *pubes* (*i.e.* fourteen, males; twelve, females).

To create *manus* the marriage had to be celebrated either by *confarreatio* or *coemptio*, or to arise by *usus*.

Confarreatio was a religious ceremony, and originally only *patricians* could avail themselves of it. A cake of spelt (*farreus panis*) was offered to Jupiter,[1] and certain sacramental words (*cum certis et sollemnibus verbis*) were spoken before ten witnesses; the Pontifex Maximus and the Flamen Dialis assisted in the ceremony.

Coemptio was the civil and *plebeian* marriage, and consisted of a fictitious sale (*per mancipationem, id est per quandam imaginariam venditionem*)[2] before five Roman citizens as witnesses, and a *libripens*.

It would appear from the account given by Gaius that the husband bought the wife (*emit is mulierem cujus in manum convenit*),[3] either from her *paterfamilias*

[1] *Farreo in manum conveniunt per quoddam genus sacrificii quod Jovi farreo fit, in quo farreus panis adhibetur; unde etiam confarreatio dicitur* (G. i. 112).

[2] G. i. 113.

[3] G. *loc. cit.*

or her tutor, but it has been contended that each bought the other.

Usus is the acquisition of a wife by *possession* and bears the same relation to *coemptio* as usucapion to a mancipation. A Roman citizen who bought some object of property and got possession of it, but not ownership, because he neglected to go through the mancipation prescribed by *jus civile*, might nevertheless become owner by usucapion, *i.e.* lapse of time; thus if the object was a movable, continuous possession for one year made him *dominus*. In like manner, if a man lived with a woman whom he treated as his wife, but whom he had not married by *coemptio* (or *confarreatio*), and the cohabitation lasted without interruption for a year, then at the end of that period the man acquired ownership of the woman as his wife, she passed to him *in manum*, and the marriage was treated as *justae nuptiae*.

As above stated, in early times only a marriage contracted in one of these three ways, and so producing *manus*, was treated as a marriage in the true sense. But as early as the XII Tables an informal marriage was, as a fact, possible, for a provision of that law in effect declared that although a man lived with a woman whom he treated as his wife, and so lived for a year, nevertheless *manus* should not arise if the wife were absent from home for three consecutive nights (*trinoctii absentia*). It is unlikely that in recognising this principle the framers of the XII Tables were introducing any novelty, since it was always regarded as of the essence of usucapion that there should be no break (*usurpatio*) in the possession, *i.e.* that it should be uninterrupted. The XII Tables, it would seem, at most definitely settled what con-

stituted a break, and some arbitrary period must sooner or later have been fixed upon, otherwise it might have been argued that the woman's absence from the house in order to go to market constituted *usurpatio*. But whether the provision of the XII Tables is to be regarded as a novelty or not, it is clear that from that time a woman had only to take care to be away from her husband's house for the stated period in *every* year of the marriage to avoid passing under his power, in which case she remained in the *potestas*, or, if *sui juris*, under the *tutela*, to which she was subject before the marriage. An informal union of this sort, which originally was probably no marriage at all, in the end won recognition ; but the wife was known as *uxor* merely, and not, as in a marriage giving rise to *manus*, *materfamilias*. Nevertheless, if the parties had *connubium*, the children passed under the *potestas* of their father, although their mother did not.

Gaius tells us that the law regarding *usus* and the *trinoctii absentia* was entirely obsolete in his time (*hoc totum jus partim legibus sublatum est, partim ipsa desuetudine oblitteratum est*) ;[1] that *confarreatio* existed (*quod jus etiam nostris temporibus in usu est*),[2] and he speaks of *coemptio* in the present tense (*coemptione vero in manum conveniunt*).[3] But *confarreatio* only survived in the time of Gaius for a special purpose and with a limited effect. The *special purpose* was to qualify a person to be a *rex sacrorum* or one of the greater flamens ; for these offices could only be held by persons born of parents who had been married in this way (*confarreati parentes*), and they had themselves to be married by the same ceremony. The *effect* was *limited*, since by a *S.C.*, Tiberius had, in order to

[1] G. i. 111. [2] G. i. 112. [3] G. i. 113.

induce people so to qualify, restricted the operation of *confarreatio*; it was no longer to produce *manus* save to give the wife her husband's *sacra*; for all secular purposes she was to remain a member of her old agnatic family. *Usus* then was obsolete in Gaius' time, *confarreatio* had an extremely limited application, *coemptio* remained as the sole means of producing *manus*, but there is reason to believe that it existed in theory merely as a fictitious process, to achieve certain purposes unconcerned with marriage.

The fact is that when Gaius wrote *manus* had become practically obsolete. By a gradual and obscure development, which was probably complete by the time of Cicero, the informal marriage without *manus* had come not only to be the normal form of marriage but to be recognised as *justum matrimonium*, *i.e.* a valid legal marriage, by which, although the wife did not come under her husband's power, the children and other issue of the marriage through males did.

Under Justinian, therefore, and for centuries earlier, any declaration of consent, in whatever form given, sufficed for a legal marriage (*consensus facit nuptias*), provided, of course, that conditions (i.), (ii.), (iii.), and (iv.) (*supra*) were also satisfied, and provided also that the wife was in some way transferred to the husband's control, a transfer usually evidenced by the *deductio in domum*, *i.e.* bringing the bride from her father's to her husband's house.

As distinguished from *matrimonium*, *concubinatus* was the term applied to a permanent union without marriage between a free man and woman. The concubine was not called *uxor*, nor were the issue of the marriage under the *patria potestas* of the husband.

Contubernium denoted the marriage of slaves, and was without legal result.

B. *The effect of marriage.*

(i.) *Marriage in manum.*—Here, as already stated, the wife ceased to be a member of her old family, and, unless she came under the *potestas* of the person in whose power her husband was, fell under the *manus* of her husband *filiae loco* (in the position of a daughter for the purposes of succession), and, speaking generally, he acquired the same rights as a *pater* over a *filiusfamilias*.[1] With the woman herself passed the whole of her property (if, being *sui juris*, she had any, or if, being *alieni juris*, her *paterfamilias* had given her a dowry) by a *successio per universitatem*, and during marriage, whatever she acquired was acquired for the person in whose *manus* she was. For obligations contracted before the marriage the husband (or his ancestor) was not liable, nor, originally, was the woman herself; but one of the reforms of the praetors allowed process against her and judgment to be satisfied out of the property which her husband took through her on marriage.

(ii.) *Marriage without manus.*—In this case the consequences were wholly different. If at the time of the marriage the woman were subject to *potestas*, she, after the marriage, continued in the eye of the law under that *potestas*; if she were *sui juris* (*e.g.* all male ancestors had died), but under *tutela*, she remained under that *tutela* until the time when the *tutela perpetua* became obsolete; after the disappearance of that *tutela* the woman, although married, had

[1] But it would seem that, before subjecting her to the graver punishments, it was usual to consult a family council.

a complete legal status of her own, and could acquire property, enter into obligations, and bring actions just as a man could. Gifts between husband and wife, apart from trifling exceptions, were void, partly as a protection to the wife, and partly in the interests of creditors. Having this independent status, her property was necessarily, as we should say, her separate property, and her husband had no right in regard to it apart from private agreement. This fact led to the institution of a marriage settlement (*dos*) which, together with the corresponding *donatio propter nuptias*, may be briefly described in this place.

Dos was not legally essential to marriage, but it was evidence that marriage and not concubinage was intended. It consisted of property made over to the husband, as a kind of contribution towards the expenses of the new household (*onera matrimonii*); he enjoyed the income while the marriage lasted, and was technically owner (*dominus*) of the whole *dos*, capital as well as income. That part of the property which, on marriage, was not brought into settlement as part of the *dos* was known as *parapherna*, and of course in relation to this the husband had no rights of any kind. Of *dos* there were three kinds:

(1) *Dos profectitia* was that provided by the father or other paternal ancestor, who were under a legal duty to the woman to provide dowry; (2) *dos adventitia* was dowry coming from any other source (*aliunde quam ex re patris*); (3) *dos receptitia* was given with a stipulation that it was to be returned to the donor on the wife's death.

A *dos* might be constituted in three ways:[1]

[1] These were the usual, but not the only ways; a dowry might, *e.g.*, be constituted by *stipulatio*.

(1) *Aut datur*, it might be handed over at the time the agreement was made; (2) *aut dicitur*, an ancient form of verbal contract, which became obsolete, by which the bride herself, or her paternal ascendant, or her debtor might engage to give it; (3) *aut promittitur*, this was the ordinary course, when the *dos* was not actually handed over at the time; the person agreeing to give it binding himself to do so by a solemn *stipulation* (*i.e.* the ordinary verbal contract, *infra*). From the time of Theodosius and Valentinian a mere promise (though not expressed as a stipulation or otherwise made legally binding) to give a dowry became actionable as a *pactum legitimum*.

The husband, being the legal owner of the whole *dos*, had not merely the right to manage it and enjoy the income, but might alienate the capital. To prevent an improvident disposition it was provided by the *lex Julia de adulteriis*, 18 B.C., that the husband should not sell *immovable property in Italy* forming part of the *dos* without his wife's consent, or mortgage it even with such consent, and this provision was extended by Justinian so as to prohibit any kind of alienation of the immovable part of the *dos*, even not in Italy, but in the provinces, and though the wife consented. It must also be borne in mind that a *fundus dotalis* was one of the things to which no title could be gained by usucapion.

Dos on the termination of the marriage. If the *dos* were *receptitia*, *i.e.* if the donor had made the husband, at the time of the marriage, engage by a verbal contract or stipulation (*cautio rei uxoriae*) to restore the *dos*, the donor or his heir could compel restoration of the dowry on the termination of the marriage by an

action on the stipulation. If the marriage ended through the death of the husband, the wife took the *dos*; if, by divorce, owing to the wife's misconduct, the husband could make certain deductions depending on the number of children of the marriage. If the wife died first, the donor could bring the *actio rei uxoriae* for the recovery of *dos profectitia*, otherwise it and *dos adventitia* went to the husband, till Justinian preferred the children to their father. Thus in no case could the husband benefit by the *dos*. He could claim a rebate in respect of outlay upon the dotal property which was actually necessary for its preservation, but was obliged to make compensation for any loss; and, as a further protection, Justinian gave the wife a *tacita hypotheca* (implied mortgage) over her husband's whole estate. He abolished the *actio rei uxoriae* and made the *actio ex stipulatu* apply in all cases.

Donatio propter nuptias was a gift on the part of the husband, as a kind of equivalent for the *dos*. Originally it was known as *donatio ante nuptias*, and could only be constituted before marriage, since it was against the policy of Roman law to allow gifts between husband and wife, but Justin I. provided that it might be increased after marriage, and Justinian that it might even be constituted after marriage, wherefore the old name, *ante nuptias*, became inappropriate, and *propter nuptias* was substituted for it. The object seems to have been to secure a provision for the wife in the event of her surviving the husband or in the event of the marriage ending by a divorce through the husband's misconduct. Ultimately the husband's ancestors were by statute placed under the same obligation to provide this donation as the bride's

ancestors were to provide the *dos*, and by a constitution of Justinian the amount of the *donatio* had to be equal to the amount of the *dos* which the husband took. The actual control and management of the *donatio* during the marriage belonged to the husband, but under Justinian the husband could not alienate the immovable part of the *donatio*, even with his wife's consent, and the wife was given a *tacita hypotheca* to secure it. On the termination of the marriage by the husband's death or misconduct, the wife, if there were issue of the marriage, took a life interest in the property, sharing the *dominium* with the issue.

C. *The termination of marriage.*

Marriage came to an end—

1. By the death of either party.[1]

2. By either party becoming a slave. Captivity originally ended marriage, but under Justinian, not if the husband was known to be alive. If this were not known, the wife could not re-marry for five years.

3. If the marriage were under the old law, and *in manum*, by either party undergoing *capitis deminutio minima* (*infra*).

4. By divorce. Under the old law a marriage celebrated by *confarreatio* could only be put an end to by an equally formal act, viz. *diffarreatio*, *i.e.* another sacrifice to Jupiter in the presence of the pontiffs with *contraria verba*. If arising by *coemptio* or *usus*, the marriage could only be dissolved by the husband emancipating his wife, though, as she stood to him as a *filia* merely, one sale was enough to break the tie. After marriage *in manum* had become obsolete, marriage, resting as it did merely on consent,

[1] For the effect of *incestus superveniens* see Moyle, p. 130.

could be dissolved either at the will of both parties (*divortium*), or by either party giving notice (*repudium*), which after the *lex Julia de adulteriis* had to be in writing sealed by seven witnesses.[1] This freedom of divorce was not abolished by the legislation of the Christian Empire, though one party to the marriage unjustly divorcing the other came to be penalised, mainly in a pecuniary sense, *e.g.* the wife might forfeit her rights in respect of the *dos*.

Section IV. Tutela and Cura

A person, although a freeman, a citizen, and *sui juris*, might still lack full legal capacity, viz. if subject to the control of a tutor because of extreme youth, or to the control of a curator because, for example, of lunacy. To complete 'the law which concerns persons', therefore, an account of each of these institutions must be given.

Subsect. 1. Tutela

Tutela is of two kinds—

A. *Tutela impuberum.*
B. *Tutela perpetua mulierum.*

A. *Tutela impuberum.*

Every boy and girl who was *sui juris* and under the age of puberty had to have a tutor whose *auctoritas* supplied the want of capacity in the pupil, and *tutela* is accordingly defined as *jus ac potestas in capite libero ad tuendum eum qui propter aetatem se defendere nequit.*[2] But this was not its original purpose.

[1] The *lex Julia de adulteriis* required the presence of seven witnesses.
[2] J. i. 13. 1.

It was an institution primarily in the interests of the tutor, who was there to protect the property that would be his in case the child died before puberty. Hence he is tutor under the XII Tables who has the right of succession to the property. 'It seems to have been originally conceived of as an artificial extension of the *potestas*, till the child was capable of founding a *potestas* for himself.'[1] In later law the view changed completely as Justinian's definition, following Servius, goes to show. The subject may be considered under three heads: its origin, extent, and termination.

(*a*) *How it originates.*

1. *Tutela testamentaria.*—The normal tutor to a person *sui juris* but under puberty was the clearly specified person appointed to be such tutor by the will, or by a codicil confirmed by the will, of the *paterfamilias*, by whose death the boy or girl in question became *sui juris*. Hence a grandfather could only appoint by his will a tutor for his grandson if the father had died or undergone *capitis deminutio*; for if the grandson on the death of the grandfather fell under his father's *potestas* there was, of course, no need for a tutor, because the boy would not be *sui* but *alieni juris*. Certain formal words had to be used; *e.g.* 'I appoint Balbus tutor', or 'Let Balbus be tutor'. In ordinary cases the appointment by will was enough in itself to make the person nominated tutor on the death of the testator, but in certain exceptional cases, owing to some defect or informality, confirmation by the magistrate was necessary; *e.g.* if formal words were not used, or the appointment was made in an unconfirmed codicil, or to an emanci-

[1] Buckland, p. 143.

pated son who had been appointed heir in the will; for as *tutela* was a substitute for *patria potestas*, and there was no *potestas* here, there was in strictness no right to appoint a tutor.[1] A testator might appoint as tutor anyone who possessed *testamenti factio*,[2] and since a tutorship was considered a public office, even a *filiusfamilias* was capable of holding it. A testator might appoint his slave to be tutor, at the same time giving him his freedom, and in Justinian's time the mere appointment carried freedom with it, unless the testator appointed his slave *cum liber erit*, in which case the appointment was void, because the testator showed by the use of these words that although he had the power to free the slave, he did not intend to do so. On the other hand, the appointment of another person's slave was valid[3] if made subject to the condition, 'when he shall be free', and where these words were omitted they were implied. The heir was bound, if possible, to purchase the slave and free him; until, in this or some other way, the *servus alienus* acquired his freedom he could not be tutor. A Junian Latin was expressly excluded.

2. *Tutela legitima.*—An *impubes* to whom no tutor had been appointed by will would usually have a *legitimus* or statutory tutor; the statute in question being the XII Tables as interpreted by the jurists. The *tutela legitima* is either *agnatorum*, or *patronorum*, or *parentum tutela*.

[1] For other cases see Moyle, p. 152.

[2] *Vide* p. 259. Aliens, women, and persons themselves under guardianship could not be appointed guardians in any manner, although ultimately an exception was made by which a widow might be appointed guardian of her infant children.

[3] *Servus autem alienus pure inutiliter datur testamento tutor* (J. i. 14. 1).

(i.) *Legitima agnatorum tutela.*—A person becoming *sui juris* under the age of puberty, and having no testamentary tutor, had, under the provisions of the XII Tables, as his *tutor legitimus* his nearest agnate or agnates, for if there were several agnates in the same degree, they all became tutors. The reason why these agnates were appointed tutors by the XII Tables was that they would succeed as heirs to the ward's property on death intestate and without issue, *quia plerumque ubi successionis est emolumentum ibi et tutelae onus esse debet* (because generally where the advantage of succession is there the burden of *tutela* ought to be). If there were no agnates, the tutorship originally passed, like the property, to the nearest *gentiles*. After the 118th Novel of Justinian this *tutela* devolved on the nearest *cognate* capable of acting as guardian instead of, as theretofore, upon the nearest agnate.

(ii.) *Legitima patronorum tutela.*—If a master manumitted a slave under the age of puberty, he (and his children after his death) became that slave's patron and *tutor legitimus*; *legitimus* not because the XII Tables expressly gave such *tutela* to the patron and his children, but by means of the interpretation of the jurists, who held that since the patron and his children acquired rights of succession to the freedman (*emolumentum successionis*), it was only fair that the *onus tutelae* should accompany the benefit.

(iii.) *Legitima parentum tutela.*—On a like analogy, a *paterfamilias* who emancipated a person in *potestas* under the age of puberty not only acquired a right of succession but became his *tutor legitimus*.

There were certain exceptions to the rule that the advantage of succession and the burden of *tutela* went

together, as the word *plerumque* (generally) shows: (*a*) where a bonitary owner manumitted, but, to make the manumission effective, the quiritary owner again did so, the former had the succession but the latter was tutor;[1] so also manumission by a bonitary owner made the *impubes* into a Junian Latin, and by praetorian law the succession was with the owner *in bonis*; but by the *lex Junia* the *tutela* was with the quiritary owner. (*b*) If a woman manumitted a slave *impubes*, she had the succession but could not be tutor.

3. *Tutela fiduciaria.*—In the time of Gaius this term denoted two kinds of *tutela* arising under a trust (*fiducia*): (*a*) that next mentioned as surviving under Justinian, and (*b*) that which arose when in the emancipation of a child under puberty the ultimate manumission was made by the *extraneus manumissor* (*supra*), who thereupon became the child's *tutor fiduciarius*, though, on principle, as he had the right of succession he ought to have been *tutor legitimus*. This was obsolete in Justinian's time owing to the change in the form of emancipation, when *tutela fiduciaria* only arose where a *paterfamilias* emancipated a person in his *potestas* under the age of puberty, and then himself died. Thereupon the unemancipated male children of the deceased became fiduciary tutors to the person who had been emancipated. For example, A has two sons, B and C, in his *potestas*; he emancipates C, *aetat* eleven, and thereupon becomes C's *tutor legitimus* (*supra*). Next A dies, and then B becomes his brother's fiduciary tutor until C attains fourteen.[2] The *tutela* may be fiduciary because it is

[1] Buckland, p. 146.

[2] But note that on the death of a *patron* who is tutor to his freedman under puberty, the *tutela* passes to the patron's children as *tutela legitima*. For the reason see J. i. 19.

probable the *parens manumissor* was originally fiduciary tutor to the emancipated *impubes*, but was converted into a *tutor legitimus* by the interpretation of the jurists, because he had the right of succession.

4. *Tutela dativa.*—In default of any other tutor, a tutor may be appointed by the magistrate (*tutor dativus*). Formerly the appointment was made at Rome, under the *lex Atilia*, by the *praetor urbanus* and a majority of the tribunes of the *plebs*; in the provinces by the *praesides*, under the *lex Julia et Titia* (31 B.C.). But before Justinian's time tutors had ceased to be appointed under those laws (because, among other reasons, they contained no provisions to secure that the tutor did not waste the ward's property), and in his time the appointment was at Rome by the *praefectus urbi* or the *praetor tutelaris* (a special officer who had been appointed by Marcus Aurelius), in the provinces by the *praesides*, after inquiry, or, if the property of the pupil did not exceed 500 *solidi*, by the *defensores* [1] of the city, and they were required to take security.

(*b*) *Disqualifications for the office of tutor.*

Slaves; peregrins; Junian Latins (but not colonary Latins); women; but exceptionally under Justinian a widowed mother (or grandmother) could demand appointment as tutor to her children (or grandchildren) on giving an undertaking not to re-marry, renouncing the benefits of the *S.C. Velleianum*, and giving a hypothec (mortgage) over all her property to protect the interests of the children; an *impubes*, and under Justinian those under twenty-five; physical or mental incapacity; and misconduct in the case of a *tutor dativus*.

(*c*) *The effect of tutela.*

[1] Local magistrates.

The tutor's duties were twofold:

(i.) To administer the ward's property to the best advantage (*rem gerere*); and he was liable not merely for fraud (*dolus*), but, later, for failure to show the same amount of care as he displayed in the conduct of his own affairs (*diligentia quam suis rebus*); and

(ii.) *Auctoritatem interponere*, to supplement the pupil's legal incapacity when any juristic act had to be done; and it is this last aspect of *tutela* which is its essence. The tutor had to be present in person. The position in this respect may be summed up by saying that without his tutor's *auctoritas* the ward could do nothing to his detriment (*Namque placuit meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriorem vero non aliter quam tutore auctore*).[1] A ward, therefore, could not legally enter upon or accept a *hereditas* (inheritance), for it might be insolvent (*damnosa*), or apply for *bonorum possessio*, or bind himself by any contract which imposed obligations upon him. But the pupil was not allowed to take an unfair advantage of this state of things. If, for example, a pupil was owed money and, being paid, gave a receipt to the creditor without *auctoritas*, the receipt would be invalid at law, as it did not make the ward's position better; but if the pupil retained the money and afterwards sued for the debt, he could be defeated by the equitable plea of fraud (*exceptio doli*).[2] Receipt by the tutor alone was not safe, for if he fraudulently converted the money, the debtor must make good the loss. Payment to the pupil with the *auctoritas* of the tutor was the safe way, but as this might be

[1] J. i. 21. *pr.* [2] J. ii. 8. 2.

inconvenient, Justinian permitted payment to the tutor under the sanction of a magistrate.

It must be borne in mind that in giving his *auctoritas* the tutor was merely supplementing the pupil's own act. If, therefore, the pupil were himself incapable of acting (*i.e.* was *infans*, under seven years), and the act were a civil law act (*actus legitimus*), which could not be performed by another, the act in question could not be done at all.[1] But this principle was to some extent relaxed in later law. If the business were *juris gentium* the tutor could act alone.

The ward was protected against possible abuse by the tutor of his large powers in the following ways:

(1) Under the law of Justinian an inventory of the goods of the ward had to be made in conjunction with a *publica persona* before the tutor could act. (2) On entry into office all tutors except those appointed by will or by a superior magistrate[2] after inquiry, had to give security (*satisdatio*), *rem pupilli salvam fore* (that the property of the pupil would be safe), and this was done by means of the guarantee of three persons who entered into the verbal contract, *fidejussio*. (3) A tutor might be removed from office for misconduct by, *crimen suspecti tutoris* mentioned in the XII Tables, the accusation (*postulatio*) being open to anyone, and if *dolus* (fraud) were proved, removal involved *infamia*. (4) If the tutor in the management of the ward's property failed to show *diligentia quam suis rebus*, he was liable in damages on the quasi-contractual relation in which he stood

[1] Theodosius and Valentinian allowed a tutor to enter upon a *hereditas* in the name of the infant.

[2] A tutor *testamentarius* and one appointed by the higher magistrates were exempt from giving security, as were, usually, an ascendant and a patron.

towards the pupil. (5) If the tutor converted the ward's property to his own use, the ward, when *tutela* ended, had the *actio de rationibus distrahendis* for double damages, an action which seems to date from the XII Tables. (6) At the end of the guardianship the pupil could compel his tutor to render an account and to hand over his estate, and for any breach of duty there was the *actio tutelae directa*,[1] condemnation in which, if fraud were established, involved *infamia*. (7) By a constitution of Septimius Severus the tutor was prohibited, except with the magistrate's leave, from alienating the *praedia rustica* and *suburbana* (landed property, rustic or urban), belonging to the pupil, a rule subsequently extended to all property of the pupil of any considerable value. (8) By a constitution of Constantine the ward was given a statutory mortgage (*tacita hypotheca*) over the tutor's property in respect of any claims he might have against him. (9) Lastly, in addition to his remedy against his tutor, a pupil might bring a *subsidiaria actio* for damage sustained against an inferior magistrate who had wholly omitted or failed to take sufficient security from the tutor on appointment.

(*d*) *Tutela impuberum ended*—

1. By the removal of the tutor from office by the magistrate. The *postulatio suspecti* was a quasi-public action and could be brought by anybody, even by a woman; it lay against any sort of tutor, even a *testamentarius* or a *legitimus*, but in the case of a patron his reputation was spared by the grounds for his removal not being made public.

2. By the death of pupil or tutor.

[1] The guardian had the *actio tutelae contraria* to compel his late ward to indemnify him for necessary expenditure.

3. By the pupil attaining puberty.

4. By the retirement of the tutor from office (*abdicatio tutelae*). But a specific ground recognised by the law[1] had to be adduced (*e.g.* being over seventy or ill), both as a ground for refusing a tutorship *ab initio* and for retirement.

5. In the case of a tutor appointed until a condition is accomplished or *ad certum tempus* (to a certain point of time), the fulfilment of the condition or the expiration of the period brings his tutorship to an end.

6. By the pupil suffering any kind of *capitis deminutio* (change of status).

7. By the tutor suffering *capitis deminutio maxima* or *media*, or in the case of the *legitimus tutor*, even *capitis deminutio minima*; the reason being that *capitis deminutio minima* (as will appear later) meant the break of the agnatic tie, and on this the *legitima tutela* (at any rate of the agnates and parents) depended.

B. *Perpetua tutela mulierum.*

Justinian only describes the *tutela impuberum*, for it was the only kind of *tutela* which existed in his time. In the time of Gaius, however, there was another kind of *tutela*, although even then the institution was almost obsolete, viz. the *tutela* of freewomen of whatever age (*i.e.* although over puberty), whether born or made free (*libertina*). The theory of the old law was that a woman was never wholly independent: she was either *alieni juris*, *i.e.* in the *potestas* of her ancestor, or *in manu* to her husband or the head of his family, or if *sui juris*, under *tutela perpetua*. Gaius attributes the institution to the conviction

[1] Originally a tutor *testamentarius* could resign his office at will.

of the ancient lawyers that women were fickle-minded, but questions the adequacy of the explanation. The true reason may be that *tutela* was a substitute for *patria potestas* till the child could found a *potestas* of its own. This a *pupillus* could do at fourteen, but a woman never; hence the *tutela* of women was *perpetua*.[1] Another reason advanced is that the expectation of the agnates or patron to the succession to a woman was lifelong, as she could have no *sui heredes* to exclude them; hence too the *tutela* was lifelong or *perpetua*.[1] Her tutors might be one of the following kinds:

1. *Testamentarii, i.e.* a tutor appointed by the will of her father or husband. Her husband, instead of appointing a definite tutor, might give his widow a choice, in which case the tutor had the special name of *optivus*.

2. *Legitimi tutores.* The woman might by the law of the XII Tables, or the interpretation put upon it, be under the *legitima tutela* of—(*a*) her *parens manumissor*, or (*b*) of her agnates, *i.e.* if there were no testamentary tutor, or (*c*) if a freed woman, of her patron or his children.

3. *Fiduciarii tutores.* This kind of tutor arose from a device adopted by women to escape the control of their agnatic tutor, but only with his consent. The woman sold herself in fictitious marriage (called *coemptio fiduciae causa*,[2] as distinguished from *coemptio matrimonii causa*) to a third person, who was under an obligation to remancipate her to some person of her choice upon trust to free her, to whom the woman

[1] Buckland, pp. 143 and 167.

[2] *Coemptio fiduciae causa* was of three kinds:
(1) As here, *tutelae evitandae causa*.
(2) *Testamenti faciendi causa* (*vide infra*).
(3) *Interimendorum sacrorum causa* (see Cicero, *Pro Mur.* xii. 27).

thereupon stood *in mancipii causa*. This last person manumitted the woman, and thereupon became her *tutor fiduciarius*.[1]

4. *Cessicii tutores*. A *legitimus tutor* might transfer his tutorship to another by a fictitious lawsuit, in which case the new tutor was known as *tutor cessicius*, but on his death, or ceasing to be tutor in some other way (*e.g.* by *capitis minutio*), the *tutela* reverted to the original tutor.[2]

5. *Dativi* were tutors appointed in the absence of any other tutor by the Court.

The extent of the tutor's authority.—It was not the duty of a tutor of a woman of full age to manage her property (*rem gerere*), as in the case of an *impubes*, but merely to authorise and give validity to her acts (*auctoritatem interponere*) in certain cases, *e.g.* if the woman was to be a party to a *judicium legitimum*, or to burden herself with an obligation, or to participate in a *jure civili* transaction in which she might be prejudiced, like the manumission of a slave, the conveyance of *res mancipi*, the making of a will, the acceptance of an inheritance, or the creation of a *dos*. Without the tutor's consent, however, she could alienate her *res nec mancipi* and enter into any obligation by which her condition was improved. She could lend money and recover, as on a *mutuum*. If her debtor paid her money due, she could give a valid receipt; but if, without receiving the money, she gave a release (*acceptilatio*), which in the case of a man would have extinguished the debt, her act had no effect. But all tutors except *legitimi* could be forced to give their consent; and even these could be compelled if there were pressing reasons for it.

[1] G. i. 115. See Buckland, 120.

[2] G. i. 168-170.

A woman who was *sui juris*, but subject to *tutela legitima*, could not, for some reason which is not clear, make a valid will even with the consent of her tutor.[1] Perhaps consent to her marriage could not be withheld, hence the *coemptio testamenti faciendi causa*.[2] The woman chose some friend who agreed to become her tutor. She then, with the consent of her *tutor legitimus*, conveyed herself by *coemptio*[3] to a third person, who in turn transferred her by mancipation to the friend in question, who manumitted her, and so became her *tutor fiduciarius*, whose consent to her will could, if necessary, be compelled.

By the time of Gaius the *tutela* of women of full age (from which the vestals had always been exempt) had become of small importance; by the *lex Julia et Papia Poppaea* women with the *jus liberorum*[4] were freed from the *perpetua tutela* altogether; a *lex Claudia* (A.D. 47) abolished the *legitima tutela agnatorum* (which was, of course, the commonest and most important *tutela* of all), and Hadrian made unnecessary the *coemptio testamenti faciendi causa*. The effect seems to be that when Gaius wrote, tutors, though their consent still remained formally necessary, could be compelled to give such consent unless the *tutela* was the *legitima tutela* either of a patron or a *parens manumissor*, and that even in these cases

[1] Buckland, pp. 168-169. See *ib.* notes 2 and 3, p. 120.

[2] This is purely conjectural. Gaius clearly requires *auctoritas* for marriage (G. i. 115), and a *tutor legitimus* would probably want to withhold it, where the marriage was merely to circumvent the difficulty of making a will, unless the marriage afforded an easy way out of an irksome *tutela*. For the whole subject see the references to the preceding note.

[3] *Coemptio testamenti faciendi causa* (G. i. 115*a*).

[4] A woman of free birth escaped from *tutela* in right of having three children; a freed woman in right of four.

consent could only be withheld when the woman desired—(*a*) to alienate her *res mancipi*; (*b*) incur an obligation at civil law; or (*c*) make a will (G. i. 192).[1] The reason, of course, why the patron or the *parens manumissor* was allowed to withhold his consent was that, in the absence of alienation by the ward in her lifetime, or by her will, these persons were the ward's heirs, and as such entitled to her property.

Gaius accordingly tells us that women of full age manage their own affairs;[2] that in some cases the giving of the tutor's authority is merely *pro forma*; that not infrequently the tutor is compelled to give it whether he will or not, and that this is the reason why at the end of the tutorship the woman of full age has no *actio tutelae* against her late guardian. The further statement in Gaius[3] that 'women seem to be better off than men in regard to will-making, since they can make a will at twelve, whereas a boy must wait until fourteen', seems to require qualification, because—(*a*) in theory women under any kind of *tutela* required their tutor's *auctoritas* to make a will, and without it the will was invalid *jure civili*, though the praetor might grant *bonorum possessio* under it; and (*b*), as above stated, the consent of the patron or *parens manumissor* was absolutely essential to the validity of the ward's will, and the *heres* named in a will made without such consent was neither *heres jure civili* nor could he obtain *bonorum possessio* from

[1] In cases (*a*) and (*b*) a patron or parent could, exceptionally, be compelled to give his consent if there were a weighty reason (G. i. 192).

[2] This was always the case; the tutor of a woman of full age never had the right *rem gerere* on behalf of the woman (*vide supra*).

[3] G. ii. 113.

the praetor (*alioquin parentem et patronum sine auctoritate ejus facto testamento non summoveri palam est.*[1]

After the time of Gaius the *perpetua tutela* seems to have steadily decayed; it survived, in theory, at any rate, to the time of Diocletian, but there is no mention of it in the *Codex Theodosianus* or in Justinian's compilations.

Subsect. 2. Cura

Cura was a form of guardianship indicated by the necessities of the case, with respect to persons who, though *sui juris*, were in need of protection. It was not regarded as a substitute for *patria potestas* as *tutela* was.[2]

There are four main kinds of *cura* as a species of guardianship in Roman law—the *cura* of *furiosi*, of *prodigi*, of *adolescentes*, and lastly, the later extension to special cases, *e.g.* dumb persons.

From the time of the XII Tables the *cura* of *furiosi* and of *prodigi* was recognised, a *furiosus* (madman) being placed under the guardianship (*cura*) of his nearest agnates (*cura legitima*), and if there were no agnates, under the *cura* of his *gentiles*. It extended to the person as well as the property, and in the latter respect is much the same as in the case of the *tutela* of infants. In the case of a spendthrift *prodigus*) the magistrate might subject the administration of his affairs, on the petition of relatives, to some person whom he appointed *curator*, usually one of the relatives themselves, at the same time prohibiting the *prodigus* from the management of his own property.

[1] G. ii. 122. [2] Buckland, p. 169.

Though not so ancient as the two former, a new kind of *cura* soon arose, viz. the *cura* of those persons (*adolescentes*) who were *sui juris*, and had attained puberty, but who, being under twenty-five, were regarded as still entitled to protection. Such persons had, according to the strict theory of the civil law, an absolute legal capacity, and even down to the time of Justinian the law did not require them to have a *curator* save in one single instance, viz. when a party to a lawsuit (*Inviti adolescentes curatores non accipiunt praeterquam in litem*).[1] In fact, however, most minors[2] had a *curator* to look after their interests, partly by reason of the *lex Plaetoria* (of uncertain date but mentioned by Plautus), partly because of the praetor's practice of *in integrum restitutio*. The *lex Plaetoria* subjected to a *criminal prosecution* (involving a penalty and *infamia*) any person who could be proved to have taken fraudulent advantage of a minor, and later an *exceptio* (defence) was framed on the statute (*exceptio legis Plaetoriae*), which enabled a minor to defend with success an action to enforce a transaction into which the minor had entered through the fraud or sharp practice of the other party. The praetor went further: a minor could, on application to him, provided it were made within a year, get any transaction which occasioned damage to him set aside (*in integrum restitutio*) where the minor was the victim of trickery or inexperience. Tradesmen naturally became unwilling to enter into any dealings with such 'favourites of the law' unless the minors were represented by some elder person, whose *consensus*,

[1] J. i. 23. 2. Sometimes even an *impubes* might have a curator to represent him in a lawsuit, viz., where he had a dispute with his own tutor, who could not therefore represent him (J. i. 21. 3).

[2] Minor is here, for brevity, used as equivalent to *adolescens*.

which, unlike the *auctoritas* of the tutor, was quite informal, was valuable protection to the tradesman and a convincing answer to any subsequent charge. For these reasons, therefore, most minors had *curators*, so to speak, forced upon them, till they reached the age of twenty-five, if they wished to enter into commercial relations, and Marcus Aurelius seems to have enacted that a minor might, on mere application[1] to the magistrate, obtain a permanent *curator* of his property. Though it was not legally necessary to have a *curator* at any time, under Justinian it was the usual thing. If there was no *curator*, the praetor's *restitutio in integrum* applied; but the *consensus* of the *curator*, though not an absolute defence, materially lessened the probability of such a grant. In later law, where there was a *curator*, the minor seems to have been in much the same predicament as a *pupillus*, and unable to do anything whereby he might be detrimentally affected unless with the *consensus* of the *curator*. The *curator*, like the *tutor*, could act alone, and seems to have done so increasingly, being primarily concerned with the *administratio* of the minor's property. The remedy for maladministration was the *actio negotiorum gestorum*. The institution continued till the minor's twenty-fifth year, but it might be ended earlier by special favour of the Emperor. Finally, special regulations came to be imposed by statute on the alienation of the minor's property, even with the *curator's* consent, the leave of the magistrate being in most cases necessary.

Inasmuch as (apart from special statutory provision) a minor had full legal capacity, he was in theory capable of validly performing any juristic act

[1] A minor applying under the *lex Plaetoria* had to show special ground for the appointment of a curator.

without the *consensus* of his curator, whereas a ward under *tutela* usually required (not merely the *consensus*) but the *auctoritas* of his guardian; when the curator's *consensus* was necessary, it was merely in order that an act *prima facie* valid might not easily be treated either as voidable, and so liable to be set aside by the praetor, or as having no effect by reason of the *exceptio legis Plaetoriae*. There was, however, a constant tendency to assimilate the incidents of *tutela* and *cura* in all important particulars.

By the time of Justinian other classes of persons were able to obtain a curator on application to the Court, when, owing to some infirmity peculiar to themselves (*e.g.* the fact that the applicant was of weak mind, or deaf, dumb, or subject to an incurable malady), such a course seemed desirable.

In essence the same idea is at the root of the conception both of *tutela* and *cura*, viz. the protection of persons who, though *sui juris*, are physically or mentally unable to look after their own interests, and in Justinian's time the two institutions had the following points of likeness:

(1) Tutors and curators were appointed by the same magistrates.[1] (2) Both were obliged to take an inventory on entering into office and to give security. (3) Both were bound to accept and continue in office unless some good ground of excuse could be shown. (4) Like a tutor, a curator had to give security in certain cases (*e.g.* a *curator legitimus*, but not one appointed after proper inquiry). (5) A *curator* as well as a *tutor* might be removed for misconduct by the *postulatio suspecti*. (6) A *curator*

[1] A curator could not legally be appointed by will, but if, in fact, so appointed, the magistrate had a discretion to confirm the appointment.

was liable by action[1] to account for wrongdoing or negligence (there being also an *actio subsidiaria* against a magistrate who appointed without taking due security); and (7) a *curator* was unable, without the leave of the magistrate, to alienate the ward's property of any considerable value, and his own property was subject to a statutory mortgage in the same manner as a tutor's.

On the other hand, the two institutions differ—(1) in the classes of persons whom they were designed to protect; (2) in the degree of authority originally possessed by the curator and tutor respectively; (3) whereas a tutor was necessarily *generalis*, *i.e.* appointed for the whole period of non-age, a curator might be appointed *ad hoc*, *e.g.* merely to watch over the interests of a youth who was going through the final accounts with his late tutor; and (5) as already noticed, a curator could never be validly appointed *testamento*.

Section V. Capitis Deminutio and Existimationis Minutio.

Capitis deminutio.—The legal conception of *caput* seems to be the position of a person in the eye of the law, *i.e.* of Roman law. A peregrin and a slave enjoyed no rights in civil law, and accordingly could have no *caput*. The Roman citizen alone had capacity for civil rights, and this capacity would vary according as to whether he were *sui juris* or *alieni juris*. But as it was possible to pass from one category to another, there would in the process be a loss of one's former legal capacity, and the acquisition of another in its place. It is

[1] The *actio* was the actio *negotiorum gestorum*.

something of this sort that the Romans mean by *capitis deminutio*. The *Institutes* define it as a change of status. It is not easy to fix with precision the exact significance of the terms *caput*, legal capacity, and status. For our purpose let us take them all to mean the position of a person with respect to his political and private rights as defined by the law. Probably *capitis deminutio* was originally a simple conception, for Cicero speaks of it as *capitis deminutio*, without qualification of any sort. All his applications refer to what, under Gaius, was known as *capitis deminutio minima*,[1] but it may be that from the first it included what was later known as *capitis deminutio media*, or loss of *civitas*, for in such a case the old *jus civile* of Rome had no niche for the individual. Within the State the unit was the family, for by this time the organisation of the *gentiles* had fallen into decay. Accordingly we find the conception of *capitis deminutio* divided into *major*, involving loss of family and civic rights, and *minor*, in which the latter alone were lost. Later still, owing to the rise of the *jus gentium*, aliens may have rights based on the notion of *libertas*, and so we get the well-known division in the time of Gaius into *capitis deminutio maxima*, *media* (or *major*), and *minima* (or *minor*).[2]

Capitis deminutio maxima was the complete destruction of all rights and the resulting transference of the individual concerned from the category of persons to the category of things, by reduction to slavery.

Capitis deminutio media meant the destruction of

[1] Note that though *capitis deminutio minima* destroyed the agnatic tie involved in *familia*; it left the natural tie based on *cognatio* untouched, though the two greater kinds of *capitis deminutio* put an end to this also (J. i. 16. 6).

[2] G. i. 159-160.

civitas and *familia*, but *libertas* remained. In the time of Gaius this occurred where a Roman emigrated to a Latin colony, or was interdicted fire and water (a popular decree amounting to outlawry for certain offences). Both these were obsolete under Justinian, but a *deportatio* (not a *relegatio*) *in insulam*, a permanent banishment confined to certain limits for offences, had the same effect.

Capitis deminutio minima. Its exact nature has provoked much discussion. According to Savigny it is a change of status for the worse, *e.g.* in adrogation or a sale *in mancipii causa*. *Capitis deminutio minima* was suffered in connection with emancipation and adoption, but in the former there was a gain in status, and in the latter no change. But these are explained by the sales that were incidentally necessary in early law. But we are told by Paul in the *Digest* that the children of an *adrogatus* suffered *capitis deminutio* along with their father, but they had merely changed from one *potestas* into another. Savigny regarded this as an exceptional case, or a mere juristic opinion, quoted by Paul, but not supported by him. He denies that the *filiafamilias* married *cum manu*, who became *filiae loco* to her husband, suffered *capitis deminutio*, though Gaius and Paul assert this.

On account of these difficulties Puchta regards *capitis deminutio minima* as a change of family (*mutatio familiae*). This meets the difficulties raised upon Savigny's theory, but raises others, for a son who became one of the greater flamens, or a daughter who became a vestal virgin, passed out of *potestas*, but without *capitis deminutio*. These cases may well be exceptions to the general rule.

Mommsen regarded it as the loss of previous status

by the act of subjection of one person to another within the sphere of private law. It has been objected that in the case of persons *alieni juris* there is no status to lose; but if the word status be taken to mean any condition in law, from that of the *civis* of full age and complete capacity down to the slave with an entire negation of capacity, the objection disappears. The point to stress seems to be the act of subjection and the consequential loss, not diminution, of status that results; the new status may be better or worse; the point is that the old status is lost.

Chief effects of capitis deminutio.

1. As regards the *familia*, there was a complete rupture of agnatic ties, and in the case of *capitis deminutio maxima* or *media* of cognatic ties as well. *Tutela* was ended where the pupil suffered *capitis deminutio*, but in the case of the tutor it had to be of the two greater kinds, except in the case of *tutela legitima*, when *minima* sufficed. Marriage was ended by *maxima* (except in later law in the case of captivity), but *media* reduced it to *nuptiae non justae*, while *minima* left it unaffected.

2. As regards the law of things, the effects of *capitis deminutio* will be considered in connection with the topics to which they are relevant.

Existimationis minutio.—*Existimationis minutio* is a phrase which denotes the loss of certain rights which the normal citizen enjoyed, on the ground that the individual in question had acted dishonourably (whether or not he had acted illegally as well). The earliest statutory example of anything of the kind occurs in the XII Tables,[1] but the idea of *existimationis minutio* seems to

[1] *Qui se sierit testarier libripensve fuerit, ni testimonium fatiatur improbus intestabilisque esto.* (Sohm, p. 183.)

be due less to the legislature than to the censor, who, in registering the names of the citizens, excluded from the public services, and also from certain public rights, persons who had acted disgracefully or who were employed in some disgraceful trade or business, by means of a *notatio*, *i.e.* putting a *nota* under the name of the person affected. Later the principle was adopted by the *praetor*, who in his edict gave a list of persons to whom, by reason of some dishonourable conduct, he denied certain rights in judicial proceedings (*e.g.* the right to act as agent for another), and these persons came to be known as *infames*. A person might become *infamis* at once (*infamia immediata*), for example, on becoming an actor or being expelled from the army for misconduct, or only after sentence (*infamia mediata*), not only for a crime (*judicium publicum*), but sometimes even in civil cases, *e.g.* in the *actio pro socio* (as a partner) and the *actio tutelae*.

In the developed law *existimationis minutio* seems to have included not only *infamia* but *turpitudo*, the latter being the case where, though the dishonourable conduct was not expressly declared *infamia* by a statute or in the edict, the judge visited it with some mark of displeasure in the exercise of his judicial discretion; *e.g.* he might refuse to appoint the *turpis* a guardian.

Before Justinian the results of *infamia* were as follows:

1. The *infamis* lost the *jus suffragii* and the *jus honorum*.

2. His *jus connubii* was restricted by the *lex Julia et Papia Poppaea*, A.D. 9, for the *infamis* could not marry a freeborn person; and

3. The *infamis* also forfeited the *jus postulandi*—

right to make application to the Court on behalf of another.[1]

As Professor Sohm points out, these special disqualifications had ceased to exist in Justinian's time, and it would seem that the only legal result, whether of *infamia* or *turpitudo*, was that the judge in his discretion might attach certain disabilities to the individual; *e.g.* he might refuse, as above stated, to appoint him a guardian or to admit him as a witness, and, if instituted as *heres* in a will, might deprive him of the benefit by granting the *querela inofficiosi testamenti* to the relatives of the testator.[2]

[1] G. iv. 182.

[2] See p. 216.

PART II

JUS QUOD AD RES PERTINET

It is perhaps desirable to begin with a clear idea of what the Romans meant by the term *res*. It must not be confused with 'thing' in the sense of being a material object. No doubt such objects are *res* if they form an item in anyone's wealth. But a debt, which gives rise to a mere right of action, is also a *res* from the point of view of the creditor, but not that of the debtor; so too is every benefit under a contract, for the person entitled can always maintain an action for damages. Again, if A steals B's horse, or damages it intentionally or negligently, or if A affronts B, B can sue A for damages, so that the right of action that arises is worth money and accordingly a *res*. But not all rights are *res*; *e.g.* those included in *patria potestas*, and generally those mentioned in connection with persons in the so-called Law of Persons. The test is whether a right has an economic content or not. If it is worth money it is a *res*, not otherwise. It is true that the Romans speak of *res* which are not or cannot be individually owned, *e.g.* a *res nullius*, or *res communes* (things common to all, as air, water, and the like), but this is rather a matter of classification than of legal treatment. It is with *res* as items

of an individual's wealth that the *jus quod ad res pertinet* is concerned.[1]

The *jus quod ad res pertinet* is accordingly concerned with the property which belongs to the persons who were considered in the 'Law of Persons'. Now proprietary rights, which here means those having a money value in the eye of the law, are broadly divisible into *jura in rem* or rights available against all the world; *e.g.* an owner can claim (or vindicate) his corporeal property, like his land or his slave, against all the world. But sometimes one can assert a right against all the world with respect to property belonging to another, *e.g.* a right of way or a right to light: the former are *jura in re propria*, the latter *jura in re aliena*. Again, every legal system recognises different grades of ownership; *e.g.* in English law with respect to land we have freehold and leasehold estates, and the incidents of the two differ in important particulars. Roman law had very similar notions which have to be considered. On the other hand, those rights having a money value which can be claimed only against particular persons, *jura in personam*, arising mainly from contracts and civil wrongs (delicts), are dealt with under the head of *obligatio* and form the latter part of the Law of Things. But of course the division into rights *in rem* (*dominium*, etc.) and rights *in personam* cannot be treated in watertight compartments, for the same right may well be both, depending on the point of view. Thus in English law, if A can claim B's services under a contract, he can also claim against all the world an abstinence from interference with respect to the performance of such contract. Again, rights

[1] Buckland, pp. 182-183.

in rem and *in personam* may be inextricably combined; for if I lend you a horse I remain owner, which gives me rights *in rem*, but I have a contractual right (which is *in personam*) against you for its return. Professor Buckland instances the *hereditas* (the inheritance of a deceased person), which the Romans regarded as a unity for the purposes of succession, as presenting a very complex combination of both kinds of rights. Now property and the rights arising therefrom become vested in persons by reason of some act or event which in law is known as a title, *e.g.* a conveyance, or the death of someone may invest us with property and the rights connected therewith, whereas they divest the former owners of these rights; so these titles call for examination. Rights *in personam* also arise through some investitive fact or title, like contract and civil wrong, and there may be various varieties of each. Generally speaking, then, the Law of Things deals with the different forms of ownership of *res corporales* (material items of wealth), how they are acquired, transferred, or lost, and the cognate rights *in rem* one may have with respect to another's property, their acquisition, transfer, and extinction under the general head of what may be designated *dominium*, while rights *in personam* are similarly dealt with in the second part of the Law of Things under the heading of *obligatio*. But it was not to be expected that the Roman institutional writers would be absolutely logical in their divisions. Accordingly it is not surprising to find in the Law of Actions, which ought strictly to be concerned with procedure, a discussion of rights, the proper place for which should be in the Law of Things. Here logic has been sacrificed to convenience and clearness.

The general arrangement of the Law of Things is as follows:

1. A classification of *res*.

2. The various forms of *dominium* (or *jura in rem* in one's own property) or ownership of *res corporales*.

3. Modes of acquisition of ownership of a *res singularis*:

(*a*) Natural.
(*b*) Civil.

4. *Jura in re aliena* (or rights *in rem* over another's property).

5. Acquisition by universal succession in its various forms.

6. *Obligatio* (*jura in personam*).

Section I. Classification of 'Res'

1. Gaius divides *res* into (*a*) *divini juris*, not the subject of human ownership, and (*b*) *humani juris*, owned by men. The former are *sacrae*, things devoted to the gods above, *e.g.* temples; *religiosae*, things dedicated to the gods below, *i.e.* burial-grounds (hence, though a special consecration was necessary to make a thing sacred, anyone could make ground *religiosum* by burying a corpse in it, provided he was the person charged with the duty); and *sanctae*, things under the special protection of the gods, like city walls and boundary pillars. *Res humani juris* were either *privatae* or *publicae*, not in the ownership of private persons but of public bodies, like the State and municipalities. He would thus seem to include Justinian's two heads, *res publicae* and *universitatis*.

2. Justinian's main division follows Gaius very closely: *res in nostro patrimonio*, owned by someone, and *res extra nostrum patrimonium* which cannot be owned by a private person. The latter roughly corresponds with Gaius's *res divini juris*, but is more elaborately divided into (*a*) *res omnium communes*, things which all the world may enjoy, viz. the air, running water, the sea, and the seashore; (*b*) *res publicae*, the property of the State, but dedicated to the use of its citizens, like roads, rivers, and harbours; (*c*) *res universitatis*, the property of a corporation, *e.g.* a theatre in some Roman city; (*d*) *res nullius*, which is divided in precisely the same way as Gaius's *res divini juris*. It cannot be said that the above classifications have any great importance in law.

3. The most important division of *res* is into *res corporales* and *res incorporales*. A *res corporalis* is a thing which can be felt or touched (*quae tangi potest*), such as land, a slave, and money; and this is, of course, the way in which the word 'thing' is used in ordinary conversation. A *res incorporalis*, on the other hand, is one which has no physical existence, which cannot be touched, and which merely exists in the eye of the law (*incorporales sunt quae tangi non possunt qualia sunt ea quae in jure consistunt*).[1] Examples of *res incorporales* are—

(i.) A servitude, *e.g.* a man's *right* to walk across another man's field.

(ii.) A *hereditas*, *i.e.* an individual's *estate* at any given moment, *e.g.* at death, for though the estate may consist partly of *res corporales*, such as land and money, and partly of *res incorporales*, such as debts,

[1] G. ii. 14.

yet it is regarded, as a whole, as a single *res incorporalis*; and

(iii.) An obligation, *e.g.* a man's duty to perform some promise which the law regards as binding, or to make compensation for some wrong he has done another.

The importance of the distinction is that if *res* had not included *res incorporales* (merely legal things), the *jus quod ad res pertinet* would have been confined to rights directly concerning material property (*res corporales*) merely, whereas it includes all *rights*, whether relating to property or not, which have a money value in the eye of the law, as part of a man's *patrimonium*. It is the fashion to speak of *res incorporales* as rights. This is hardly accurate, but no doubt convenient.

4. Next in importance (which is, however, historical merely) comes the division into *res mancipi* and *res nec mancipi*. *Res mancipi* were those things which could only be legally conveyed by the ceremony of mancipation; if conveyed in any other way, save by an *in jure cessio*, no civil law title passed, *i.e.* the property in the thing, the ownership of it, remained in the transferor, notwithstanding his attempted alienation, and although he had actually handed it over to another. *Res mancipi* were land and houses *in Italico solo*, slaves, oxen, mules, horses, asses, and rustic praedial servitudes.[1] It will be noticed that all these things were *res corporales* except rustic praedial servitudes, and, though these are mentioned by Gaius as *res mancipi*, it is possible that in the early law they were excluded from the list of things which were alienated by a mancipation, the essence of which

[1] G. ii. 15. 15*a*.

was the actual physical grasping of the thing to be conveyed (*mancipatio dicitur quia manu res capitur*).[1] In the case of land the taking hold of something to represent it was sufficient in the time of Gaius (*praedia vero absentia solent mancipari*),[2] but the actual apprehension of the thing to be transferred was imperative even when he wrote in the other cases, *e.g.* slaves, freemen, and animals. How a rustic praedial servitude was represented is not known. All other *res* were *res nec mancipi*,[3] and in Gaius's time the property in them passed, if there was a good ground for it, *e.g.* the thing had been sold, by delivery (*traditio*), provided, of course, the *res* in question were capable of physical delivery; *traditio* could be made, *e.g.* of a picture or a piece of furniture, but not of a *res incorporalis* or a mere right. After the time of Gaius *mancipatio* gradually lost its importance, and in the time of Justinian was entirely superseded by *traditio*, and this division into *res mancipi* and *res nec mancipi* was accordingly then obsolete.

How the categories of *res mancipi* and *nec mancipi* arose is a disputed question. Sir Henry Maine says *res mancipi* 'were the forms of property known first and earliest to each particular community', whereas *res nec mancipi* were forms of wealth of later origin, *e.g.* money and jewels. Jhering thinks that *res mancipi* were those objects of property essential to the maintenance of the joint family life. Muirhead thinks that when Servius Tullius organised the cen-

[1] G. i. 121. But see Muirhead, pp. 58-59.

[2] G. i. 121.

[3] Sir Henry Maine has suggested that in early Roman law *res mancipi* were the only objects of property recognised (*Ancient Law*, p. 274). Another theory is that *res mancipi* constituted a man's *familia*, as distinguished from his *pecunia*.

turies on a basis of wealth he had to fix the forms of property that would be made the basis of the calculation, and established public modes of conveyance for these to preserve evidence of their transfer. A strongly supported opinion is that *res mancipi* were family property of which the *paterfamilias* was merely the manager, as distinct from individual property. Another view is that it was in origin the property of the State, the use and enjoyment of which was granted to its nationals; hence the necessity of a public conveyance.

Other divisions of *res* requiring notice are—

5. *Res mobiles* and *res immobiles*. This division is found in most systems of law, and is based upon the fundamental distinction which exists between land and things attached to it (*res immobiles*), and all other property (*res mobiles*) which in its nature is not stationary, can be appropriated and taken away, and so owned absolutely in a way in which land cannot be. The division does not exactly correspond with the English division of property into real and personal, since some interests in land are personal property in England (*e.g.* leaseholds), and some things which are not land (*e.g.* title-deeds) are governed by the law of realty. At Rome the distinction between movable and immovable property did not lead to so many differences as is the case in England, where the law of real estate has still many, and in the near past had more, peculiarities, founded, as it still is, in theory, on the old feudal system. At Rome differences in the rules relating to each kind of property were based rather on the differences in the nature of the two classes of things, *e.g.* an immovable, since it cannot as a fact be taken away, could not be stolen,

and since it is, *prima facie*, of greater value and importance[1] than movable property, took longer to acquire by possession without title.

6. *Res fungibiles* and *res non fungibiles*. *Res fungibiles* are things such as money, wine, and grain, which are usually regarded not as individual units (such as a horse or a piece of land), but collectively, or, as the Roman lawyers said, *quae pondere, numero mensurave constant*. The division is of very minor importance; one instance of its application is that there could not be a loan for consumption (*mutuum*) of *res non fungibiles*.

7. *Res quae usu consumuntur* and other *res*. This, again, is an unimportant distinction. A thing which was consumed by use, *e.g.* wine and food, could not be the object of a true usufruct (or life estate).

Section II. Forms of Ownership (dominium) and Possession

1. *Dominium ex jure quiritium*.
2. *Dominium in bonis* (*bonitary ownership*).
3. *Ownership of provincial lands*.
4. *Dominium ex jure gentium* (*peregrine ownership*).
5. *Bona-fide possession*.
6. *Possession*.

1. *Dominium ex jure quiritium*.—*Dominium* or ownership was for the Romans identified with the thing owned, a method of thought very natural in an early society. But ownership is not a thing, nor is

[1] This was especially the case in early times, when land had a far greater importance than it has in these days of stocks and shares.

it a right or a bundle of rights. It is primarily a legal relation between a person and a thing, which, if established to the satisfaction of the law, through proof of the necessary title, vests in the owner the fullest control and the widest rights and powers which are conceded to anyone with respect to the thing owned. Suppose Balbus, a Roman citizen of full age and complete capacity, buys land from Titius in the manner required by law, *i.e.* by a mancipation duly performed, and has paid the price, the law now recognises that Balbus is the owner, and gives him full control with respect to its use, possession, enjoyment, alienation, fruits, and the like. This does not mean that there are no restrictions on ownership, for there invariably are some, *e.g.* Titius may have reserved a right of way over the land, and Maevius, a neighbour, may have acquired a right to light which Balbus may not obstruct, and the like; but the point is that the owner enjoys the widest rights of anybody with respect to the thing owned. He can divest himself of these in favour of others, so that his ownership becomes a valueless thing, but none the less he still remains owner, though naked of any of the advantages of ownership. He can, for instance, allow A to put up hoardings on the land, B to cultivate a plot at pleasure, C to enjoy actual possession, D the power to dispose of the property; but till D does exercise the power vested in him, Balbus continues to be the owner of the land.

Now to be quiritary owner, the highest form of ownership in Roman law, it was necessary to have (1) the *jus commercii*; (2) the *res* must be *in commercio*; (3) it must have been acquired by the appropriate method appointed by the law; and, in the

case of derivative ownership, (4) from one who was himself the owner, or duly authorised by him to transfer the ownership. To assert his claim against others he had the *vindicatio*: 'I say this thing is mine by quiritary law'. This formula was the same as that used in the methods of acquisition of *res mancipi* by *mancipatio* and *in jure cessio*.

2. *Dominium in bonis* (*bonitary ownership*).—If a *res mancipi* was not conveyed by *mancipatio* or *in jure cessio* but by mere *traditio*, though all the other conditions for acquiring quiritary ownership were satisfied, the alienor remained owner and could vindicate and recover it; the alienee had no defence, but he could thereupon sue to recover the price paid. The praetor, however, intervened to protect the alienee by granting an *exceptio* (defence) *rei venditae et traditae* (of a thing sold and delivered), and if the purchaser continued in uninterrupted possession for two years in the case of land, and one year in the case of other things, the technical defect in his title was cured by usucapion (*infra*). But if he lost possession, say after three months, he was without a remedy to recover the *res*. He might persuade the quiritary owner to do so for him, but this was not very satisfactory. Accordingly the praetor undertook to protect him by the famous *actio Publiciana*, in which the judge would be directed to find for the plaintiff if he found the thing would have been his in quiritary right, if he had held it for the period of usucapion. This modified *vindicatio* proceeded upon the fiction that the period of usucapion had been completed.[1] This form of praetorian ownership is conveniently distinguished as *dominium in bonis*, for Gaius described the *res* as

[1] See Sohm, sec. 66, and Buckland, pp. 193-195.

in bonis.[1] It enjoyed all the practical advantages of quiritary ownership, till abolished by Justinian.

3. *Ownership of provincial land.*—Just as in English law all land is *owned* by the King, from whom everyone else *holds* it, directly or indirectly, so the provinces of Rome belonged some to Caesar (*agri tributarii*) and some to the *populus* (*agri stipendiarii*). Private persons *held* such land, paying a tribute or fixed rent. These holders could not, of course, vindicate, but were granted a modified *vindicatio* in which they probably alleged that it was lawful for them to hold, enjoy, and possess the land. Justinian abolished the distinction between Italic and provincial land. In fact all land in his time was provincial land.

4. *Dominium ex jure gentium* (*peregrine ownership*).—The lack of *commercium* put peregrines outside the pale of *dominium*. *Mancipatio* and *in jure cessio* were not open to them, but they could acquire by modes of acquisition of the *jus gentium* like *traditio*. They were probably protected in much the same way as in the case of holders of land in the provinces. It disappeared under Justinian.

5. *Bona-fide possession.*—Here one who is not owner purports to transfer the ownership of some *res corporalis* to another, who receives possession of the property in good faith. If such a possessor lost possession, as he believed himself to be the owner, he would naturally try to vindicate and would, of course, fail. Aware now of the flaw in his title, he could still have recourse to the *actio Publiciana*, by which he could recover against all but the true owner, who could defeat him by the *exceptio justi dominii*

[1] G. i. 54.

(defence of lawful ownership). But unlike the bonitary, who could always acquire full ownership by usucapion, the *bonae-fidei* possessor could not invariably do so (*infra*).

6. *Possession.* — The physical control of a *res corporalis* together with the use and enjoyment derivable therefrom are among the most important advantages to which the owner of such thing is entitled. In fact, without such physical control ownership is largely valueless. In the normal case the owner is also the possessor, but the element of physical control may become detached from the owner either with his will, as in the case of a loan for use or a pledge, or against his will, as where the owner loses and another finds the thing, or in the case of theft. As possession is the most important element in ownership, the fact of possession being taken as evidence of ownership till the contrary is proved, it follows that the law must accord some sort of protection to the possessor. This is what Jhering means when he says possession is the outwork of ownership; if you protect the possessor, in the vast majority of cases you are protecting the owner as well. Further, as it is not easy to violate a man's possession without also offering violence to his person, the law protects the person of the possessor and, at the same time, prevents disturbances of the peace. Even the owner out of possession may not help himself; he must first establish in the Courts his ownership, and the law will thereupon put him into possession. These various considerations have secured that in every legal system possession as such shall be protected, the orbit of protection varying with the circumstances of the case: a thief is not protected

against the owner, but he is as against third parties, hence some inquiry into the nature of possession becomes necessary.

Savigny, building on the well-known text of Paul [1] which says, 'We acquire possession with body and mind (*corpore et animo*), not with the mind alone, nor with the body alone', holds that there are two elements of possession—*corpus* and *animus*. It is generally agreed that the former consists in being in such a relation to the thing possessed as that in which the owner normally is with respect to the thing owned; its essence is the physical power to deal with the thing. If there is no more than this we have merely *possessio naturalis*, *custodia*, or *detentio*. This is the position of the servant in English law with respect to his master's silver entrusted to him. If to this *corpus* or physical possession there be added the element of *animus*, we get what is variously called *possessio civilis*, juristic possession, or *possessio ad interdicta*, *i.e.* protected by the possessory remedies known as the interdicts. The exact nature of this *animus* or mental element is disputed. According to Savigny, it is the *animus rem sibi habendi*, the intention to hold for oneself. This may be true of the thief, but it is objected that the *creditor pignoris* (pledgee), the *sequester* (or stakeholder), and *precario tenens*, one holding at another's pleasure, have juristic possession, but do not intend to hold as owner. Accordingly, to evade these difficulties the *animus* is claimed to be an intention to exclude others from the use and control of the thing. Thus the miser possesses his hoard.[2] But the mere intention to exclude others is motiveless unless it subserves some further purpose. In the case of the

[1] *Dig.* 41. 2. 3. 1.

[2] Sohm, p. 332.

pledgee, there is his own interest to protect even as against the owner, and the tenant at will requires to be secured in enjoyment, but does not claim this against the owner, while the *sequester* has merely the interest of third parties in view. It follows that the intention to exclude may vary in orbit, depending on the circumstances of the case, but its existence can only be explained upon the ground of some interest, whether one's own or another's, that it is desirable to protect. Savigny explained these as cases of derivative possession. The slave, *filiusfamilias*, agent, borrower for use, the *colonus* or lessee, and the depositary have no intention to hold except on behalf of the owner, and so are the mere physical channels through whom the owner possesses. They have *detentio* only, the *corpus* but not the *animus*.

Jhering pointed out the difficulties raised by Savigny's theory, and the further practical difficulty caused by the necessity of inquiring into the state of the holder's mind before determining whether he had civil possession or not. Of his actual intent there could be no direct proof. It had to be inferred from the circumstances under which the possession was acquired, *e.g.* whether it was by way of pledge or a loan for use or the like, so that in the latter case which gave *detentio* merely, to prevent this from being converted into juristic possession by the holder making up his mind to hold the thing for himself, it was necessary to lay down the rule *nemo potest causam possessionis sibi mutare*. Jhering's own theory requires merely the physical relationship which gives control, coupled with an appreciation of that fact. Thus a lunatic does not possess. Cases like those of the runaway slave who is regarded as still possessed,

and of the borrower for use, and the depositary and the hirer who are denied possession in the texts, are explained as due to special rules of law creating exceptions to the general principle.

Paul's text deals with the acquisition of possession. Once it is acquired, the retention of possession does not want a constant *animus* in being. One may have completely forgotten about the matter, yet one continues to possess, and in one case *animus* alone continues possession though the *corpus* be lost, for a runaway slave continues to be possessed by his master, till someone else acquires an adverse possession.

The acquisition of possession requires either a taking of physical control or a delivery of it, coupled with the necessary *animus*. Possession could be acquired through persons who were themselves possessed, provided that in addition to the *corpus* their possessor had authorised it antecedently or had subsequently assented to it. It was doubted whether possession could be acquired through persons not possessed, *e.g.* a person *in mancipii causa* or an *extraneus* acting as agent; but in later law such acquisition was conceded, but there had to be previous authorisation and subsequent knowledge.

Possession was lost if either *corpus* (the runaway slave excepted) or *animus* were lost, but the *animus* must be expressly directed to this end. Death ends it. A slave belonging to a *hereditas* could not acquire possession, but could continue possession already begun and so acquire by usucapion. Loss of possession, through agents and subordinates, presents difficulties which need not be considered here.

Section III. Methods of Acquiring or Transferring[1] the Ownership of Single Items of Tangible Property

In describing the various means of acquiring ownership, Gaius and Justinian point out the methods by which one or more items of property could be acquired or transferred at Rome; but the methods (for the most part) only apply to tangible property (*i.e.* to *res corporales—quae tangi possunt*), and have no reference to a *res incorporalis*, such as an obligation; further, the acquisition is in all cases of a single object or of single objects, as distinguished from 'universal succession', *i.e.* the acquisition of an estate (*juris universitas*) which is made up of an *aggregate* of *res singulae*, both *corporales* (*e.g.* a deceased person's land and furniture) and *incorporales* (*e.g.* the debts owed by and to him).

Res singulae may be acquired—

(i.) By methods common to all nations (*naturales modi*).

(ii.) By methods peculiar to Rome (*civiles modi*). Justinian remarks that the *naturales modi* were by far the oldest,[2] but this is, of course, quite untrue; the *civiles modi* were the first in time, and originally the only methods by which property could be gained.[3]

[1] No separate account is given of the loss or extinction of property rights; property as such rarely comes to an absolute end, for when, on a transfer, the present owner's right is extinguished, a new right to the thing springs up in the transferee.

[2] J. ii. 1. 11.

[3] Cf. Maine, *Ancient Law*, c. viii.

Subsect. 1. Natural

I. *Occupatio.*
II. *Accessio.*
III. *Specificatio.*
IV. *Fructuum perceptio.*
V. *Traditio.*
VI. *Thesauri inventio.*

I. *Occupatio* is taking effective possession, with intent to become owner, of something which at the moment belongs to nobody, *i.e.* is either *res nullius* (*e.g.* a lion in the forest) or *res derelicta*, the former owner having definitely abandoned ownership of his property, as where a man throws away an old shoe. In the case of *res derelicta* there must be an intention to abandon on the part of the previous owner ; hence a person who appropriates things thrown overboard in a storm to lighten the ship, or accidentally dropped from a carriage, is guilty of theft. The chief cases of *occupatio* are—

(*a*) The capture of wild animals. Here the animal must be actually captured ; it is not enough to wound it,[1] and if it escapes it becomes *res nullius* once more. The animal must be wild by nature, such as a beast in the forest, bees, peacocks, pigeons, and deer, but not fowls and geese. With regard to peacocks and pigeons, which, though naturally wild,[2] sometimes come back after flying away, the rule was adopted that a mere temporary absence did not destroy ownership, so long as they had the intention to return (*revertendi animus*), and they are to be taken to have abandoned that intention, Justinian says, when they abandon the habit of returning.

[1] J. ii. 1. 13. [2] *Pavonum et columbarum fera natura est* (J. ii. 1. 15).

(*b*) Things taken from the enemy, *i.e.* belonging to the other belligerent or to his nationals and found on Roman soil. Things captured on enemy soil belonged to the State; there could be no *occupatio* here.

(*c*) *Insula nata.* If an island is formed in the sea [1] (but not if formed in a river) it is considered a *res nullius* and belongs to the first occupant.

II. *Accessio* is where a thing becomes one's property by *accruing* to something which one already owns and becoming incorporated in it. The property so gained may have been previously either a *res nullius* or a *res aliena.*

Instances of *accessio* of a *res nullius* are—

(1) *Alluvio.* Where land adjoins a river and the action of the stream imperceptibly deposits earth upon or adds it to the land in question, the earth so deposited or added becomes the property of the owner of the land by *accessio.*

(2) *Insula nata.* Where an island is formed in a river, a line is drawn down the middle of the river, and if the island falls to one side of the line it belongs wholly to the owner of that bank, but if it cuts the island it is divided between the owners of the two banks accordingly. But if both banks belong to the same person the island is wholly his.[2]

(3) *Alveus derelictus.* If a river forsakes its old course and flows in another direction, the old bed of the river is divided between the owners of the

[1] *Quod raro accidit* (J. ii. 1. 22).

[2] But if an island is formed by a river dividing itself at a given point and joining again lower down, so as to give A's land the appearance of an island, his land still belongs to him. And mere temporary inundation of land had no effect (J. ii. 1. 22 and 24).

banks, the line of division following the centre of the channel.

The following are instances of *accessio* where the thing accruing is *res aliena* :

(1) *Avulsio.* A's land is swept away by the violence of the stream and united to B's. It does not at once cease to belong to A, but it will (and so become B's by accession) when it has been united long enough for A's trees (which were swept away with the land) to take root in B's ground.

(2) *Confusio* and *commixtio.* The former is when two things not readily separable like liquids, the latter when they are separable like wheat, belonging to different owners, are mixed together ; if liquids, the result becomes the common property of both whether mixed with consent or not, and each can compel the other to make over to him his share by the action *communi dividundo* ; if it is a case of *commixtio* by consent, again the product is common to both ; if it was not by consent, then each can claim his original property by a real action, but the judge has a discretion to decide how the separation is to be made in case there is difficulty in ascertaining the identity of the various properties ; *e.g.* two mixed lots of wheat can as a fact be severed, but it would in practice be very difficult to make an exact division. In both these cases there is no question of *accessio*, for there is no incorporation of one of the ingredients in the other. But if there was such incorporation, *e.g.* where A with B's wool mends his garment, A acquired by *accessio.* It is not always easy to say whether there is incorporation or not.

(3) *Inaedificatio.* Of this there are two main instances :

(*a*) A with B's materials builds a house upon his own ground. Thereupon, since *superficies solo cedit*, A becomes owner of the building, and so long as the building stands B cannot claim his materials, because the XII Tables provide that no one is to be compelled to take out of his building *tignum* or material, even though it belongs to another. But B is not without remedy, for by means of the action *de tigno injuncto*, perhaps a specal form of the *actio furti*, he can recover double damages from A, if he acted in bad faith, and when the building is pulled down can bring an *actio ad exhibendum* and claim the materials if he has not already obtained damages. But if A acted in good faith, B's only remedy is to claim the materials, in case the building is dismantled, but he may perhaps have had an *actio in factum* for their value.

(*b*) A builds a house with his own materials upon B's ground. Again, on the principle *superficies solo cedit*, B becomes owner of the house by *accessio*. If when A built he knew the land was B's, he has no remedy, he must be taken to have made B a present; if, however, he built in the honest belief that the land was his and *is still in possession*, B cannot oblige him to give up possession without making compensation if he wants the building, for if B refuses to do so his action is defeated by the *exceptio doli mali*. If he has no use for the building, or is unable to pay for it, A can dismantle the building and remove the materials. But if B has recovered possession of the land, A's only remedy, if he acted in good faith, is to claim the materials when the house comes down.

(4) *Plantatio* and *satio*. If A plants B's tree in his own ground, or if A plants his own tree in B's ground, then, as soon as the tree takes root, it belongs

to the owner of the ground (*plantatio*). Similarly, grains of wheat (whoever may be the owner) sown in land belong to the owner of the land (*satio*). But in either case the owner of the land, if out of possession and seeking to recover it from one who has acted *bona fide*, can be defeated by the *exceptio doli mali* unless he is ready to make compensation.

(5) *Scriptura.* A writes a poem or a treatise upon B's paper. The whole belongs to B. But if the paper is in A's possession and B brings an action to recover it and refuses to pay the cost of writing, he can be defeated by the *exceptio doli*, provided A got possession of the paper innocently.

(6) *Pictura.* A paints a picture upon B's tablet. The picture is here considered the principal thing, the test in this case alone being its value, and the tablet the accessory, and so the result belongs to A. But if B is in possession, A must pay compensation for the tablet, or be defeated by the *exceptio doli.* If A is in possession, B may bring an *actio utilis* for the tablet, but must be prepared to pay for the picture, or himself be defeated by the *exceptio*; that is, if A got the tablet honestly; if A stole it, B has the *actio furti.*

(7) A weaves B's purple into his own garment. The product belongs to A. But if the purple was stolen from B, the latter has the *actio furti* and a *condictio* against the thief, whoever he may be.

It is not always easy to say which was the principal thing and which the accessory. Perhaps the true test is to ask which of the two after the incorporation has retained its individuality. Parchment is still parchment, though inscribed with letters of gold; but can we say that a tablet is still a tablet after a picture has been painted upon it? Obviously

neither the writing nor the picture could have existence without the parchment and the tablet. But the test here applied, in the case of the picture, was that of the relative value of the two. This seems contrary to principle, but was the law under Justinian.

So far we have been concerned with the question of the acquisition of ownership alone; the question of compensation to the loser needs some consideration. The question of acquisition was quite independent of whether the acquirer acted in good or bad faith; but this was all-important on the question of compensation. The acquirer need pay no compensation where the other party acted with full knowledge of the facts. But if the other party acted in good faith and was in possession, the acquirer's *vindicatio* could be met by the *exceptio doli* unless he was prepared to pay compensation. The acquirer in good faith and in possession must compensate the other party for his loss in an *actio in factum*; if the acquirer was not in possession he could vindicate but must pay the increase in the value. The acquirer who was in possession and had dealt with the accession in bad faith was liable for theft; if he was not in possession he could vindicate on payment of the increase in the value, but remained liable for theft. The special cases of compensation have been dealt with already.

III. *Specificatio* is where one man by his skill and labour converts another's material, either alone or in conjunction with his own, into a *nova species*, which perhaps means a *corpus manufactum* that is in a different category of goods from that out of which it was made, *e.g.* A makes a ship with B's wood. The Sabinians thought that the raw material was the

thing to be considered, and that the owner of the material was the owner of the product; the Proculians, that the product belonged to the maker. Justinian took a middle course (*media sententia*). If the thing could be reduced to its former state (as a statuette made by A out of B's brass), it belonged to the owner of the materials; if it could not be so reduced (*e.g.* A has made wine out of B's grapes), the maker became owner. If he acted in bad faith he was liable for theft, but if not we have no information. There was probably a *condictio* founded on unjustifiable enrichment, and possibly, later, an *actio in factum* for compensation.[1]

IV. *Fructuum perceptio.*—The *dominus* of land or animals acquires their fruit or offspring as *dominus*. A person having a limited interest (*e.g.* for a term of years) acquires the fruits of the property he so enjoys either by gathering them himself (*fructuum perceptio*) or by separation of the fruits, no matter by whom (*fructuum separatio*). It is by the former title that the *colonus* (or tenant farmer) and the *usufructuarius* (or life tenant) acquires, while the *emphyteuta* (the holder of a lease of land in perpetuity) or the *bona-fide* possessor (one who possesses another's property in the honest belief that he has a right to it) claims by the latter. Therefore, if the *usufructuarius* dies before harvest, the fruits, since they have not been gathered, do not belong to his heir but to the *dominus* or, as we should say, the reversioner. And if the fruits are wrongfully gathered by a stranger,

[1] But if A makes a new product partly by means of B's, and partly by means of his own materials, it belongs to A (making compensation) in any case (J. ii. 1. 25).

neither the *colonus* nor the usufructuary can vindicate them, but the *dominus* can. They have, however, the *actio furti* for theft as they have an interest in not being deprived of the fruits. The *emphyteuta* and the *bona-fide* possessor, however, could vindicate as well, as the fruit is theirs by mere separation. The *bona-fide* possessor, when the true owner brings an action to recover his property, is bound to restore the property itself, together with such fruits as are unconsumed at the moment action is brought, not those which he has consumed in good faith. This was the law under Justinian. The *mala-fide* possessor, on the other hand, is bound to restore or give compensation for everything, whether consumed or not. The term 'fruit' includes the young of animals, Justinian tells us,[1] so that lambs probably immediately become the property of the *usufructuarius*, but it does not include the offspring of a female slave, which, accordingly, belong to the *dominus* and not to the usufructuary.[2]

V. *Traditio.*—Delivery, though formerly only applicable to the transfer of *res nec mancipi*, became, in the time of Justinian, the common method of alienation for *res corporales*. For *traditio* to constitute a good title the following conditions must concur:

(i.) The transferor must either be the *dominus*[3] or his agent (*e.g.* tutor, or a mortgagee with the right to sell).

[1] J. ii. 1. 37.

[2] *Absurdum enim videbatur, hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit* (J. *loc. cit.*).

[3] Sometimes even the *dominus* cannot alienate; *e.g.* a husband could not alienate immovable property included in the *dos*.

(ii.) He must intend to transfer, and the other person to accept, the ownership of the thing; but the intention to confer ownership need not always be in favour of a *definite* individual; *e.g.* when the praetor throws money to the mob there is a good *traditio*, though the praetor merely intends that the first person who picks it up shall keep it.

(iii.) The thing must not be *res extra commercium*.

(iv.) There must be some good legal reason (*justa causa*) to explain the intention to transfer ownership and so to support the delivery: *nunquam nuda traditio transfert dominium, sed ita, si venditio vel aliqua justa causa praecesserit propter quam traditio sequeretur*. Such a *causa* would be, *e.g.*, that the thing had been sold to a purchaser, provided he paid the price or satisfied the vendor in some other way, or that the donor gave the *res* by way of dowry or gift; it would, obviously, not be a *justa causa* for transferring *dominium* that *traditio* of an object had been made to another for safe custody; and

(v.) There must be actual or constructive delivery (*traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur*[1]). It is a good constructive delivery (sometimes called *brevi manu traditio*) if A, who has delivered a thing to B for safe custody (and therefore not conferred *dominium*), afterwards sells or makes a present of it to him, and consents to his acquiring *dominium* (*interdum etiam sine traditione nuda voluntas sufficit domini ad rem transferendam*[2]). So, too, if A's goods are in a warehouse and he sells them to B, he makes a valid *traditio* by giving B the

[1] The chief exception was that in a *societas omnium bonorum* the partnership agreement gave, without *traditio*, each partner an interest in the property of the others.

[2] J. ii. 1. 44.

key of the warehouse. *Constitutum possessorium* was the exact opposite of *traditio brevi manu*; *e.g.*, if A bought a horse from B, but required him to keep it at livery, the bare agreement of the parties operated to transfer the ownership from B to A though B continued to be in physical possession. There might also be a *traditio longa manu* where the thing was pointed out to the transferee with authority to take it.

VI. *Thesauri inventio* (*or the finding of treasure*).—Treasure consists of jewels, coin, bullion, and the like secreted for safe keeping and never recovered by the owner, who cannot now be traced. At first not the finder but the owner of the land seems to have been entitled. Hadrian gave it to the finder if it was on his own land, or if he found it by chance *in sacro aut in religioso loco*. But the finder who found treasure on another's land by chance shared it with the owner of the land, even where the land belonged to the Emperor, or to the *fiscus*, or to some city. If he found it when searching for it, the owner of the land took all. Later the *fiscus* shared with the finder what was found on lands belonging to the Emperor, the State, or *in religioso loco*. Under Justinian, Hadrian's rules applied so far as concerned the lands of private persons, but where the lands were not so owned we do not know whether Hadrian's rule applied, or whether the *fiscus* took the whole.

Subsect. 2. Civil Methods

Justinian only mentions two methods of acquiring property at civil law, viz. *usucapio* and *donatio*. There were, however, in fact, two other ways in his

time, viz. *lex* and *adjudicatio*, and under the old law there were also the methods of *mancipatio* and *in jure cessio*. In all, therefore, it is necessary to consider—

I. *Mancipatio.*
II. *In jure cessio.*
III. *Usucapio.*
IV. *Donatio.*
V. *Lex.*
VI. *Adjudicatio.*

I. *Mancipatio.*—This method of conveying *res mancipi* has been described already. It is well to bear in mind, however, that it was applicable not only as a means of conveying property but to the ceremonies of adoption, emancipation, marriage, *coemptio fiduciae causa*, and will-making, the formula varying with the particular application, and, when used in connection with the making of wills, not containing the assertion, 'I say this thing is mine in quiritary right', which seems to have rendered the vendor liable by an *actio auctoritatis* for double damages, in case the purchaser were evicted by one claiming by superior title. It disappeared under the law of Justinian, for the distinction between *res mancipi* and *res nec mancipi* was abolished, so that even *res mancipi* could be conveyed by *traditio* and had been so conveyed for a considerable time before. The *mancipatio* transferred the ownership, whether the *res* were handed over or not, though there was of course a duty to make delivery. It had the advantage over *traditio*, that in the case of land the sale need not be on the spot, and if the *res* conveyed was required to be dealt with in some particular manner a *fiducia* to that effect could be added. There is some

doubt as to whether or not it was applicable to *res nec mancipi*; an examination of the authorities points to a negative answer.

II. *In jure cessio* has also been described, viz. as a means of freeing a slave (*manumissio vindicta*). As a method of conveyance it involved a claim before the praetor (*in jure*) by the intended alienee that the property in question was already his, exactly as in the case of *mancipatio*; if, *e.g.*, the ownership of a slave were to be transferred, the alienee taking hold of him said: *Hunc ego hominem ex jure Quiritium meum esse aio*; the owner made no counterclaim, and the praetor thereupon awarded the slave to his new master. This fictitious lawsuit had, like *mancipatio*, other uses at Rome besides being a means of conveying property. It appears, for example, as already stated, in *manumissio vindicta*, in adoptions, in the creation of servitudes, in the transfer of *tutela legitima* in the case of women of full age, and in the transfer of a *hereditas*. Gaius tells us that in his time *in jure cessio* was not often used as a means of conveyance, since it was easier in the case of *res mancipi* to use a *mancipatio* which only involved the presence of a few friends, whereas an *in jure cessio* implied a public lawsuit;[1] and there were the further advantages that a mancipation could take place anywhere, whereas an *in jure cessio* needed to be made in Court before the praetor, and the Court is not always open; and mancipation, where it was not a mere *imaginaria venditio*, carried a warranty against eviction by the *actio auctoritatis* noted above.[2] But *in jure cessio* was in use under the Antonines for some of the other purposes above

[1] G. ii. 25. [2] G. ii. 19.

mentioned (*e.g.* adoptions), and seems also to have been an existing method of creating a mortgage.[1] In Justinian's time it was altogether obsolete; it was unnecessary as a means of conveyance, since *traditio* applied to all *res corporales* and was infinitely simpler, and its other objects were either obsolete or were accomplished in a manner which did not involve its use.

III. *Usucapio* is a means of acquiring *dominium* by long-continued possession: the original periods, as fixed by the XII Tables, being in the case of immovable property two years, in the case of *ceterae res* (other things) one year. For *usucapio* to operate in favour of any given person, A, the following conditions had to be satisfied:

(1) A must actually possess the thing in question; he must have *possessio civilis* as distinguished from mere *detentio*;[2] a person to whom goods had been entrusted for safe custody, *e.g.*, had only *detentio*, and therefore, however long he might hold them, he could never, by *usucapio*, acquire *dominium*, not even if he intended to hold them for himself, because of the rule *nemo potest causam possessionis sibi mutare.*

(2) A must have the *jus commercii*; hence no *peregrinus* could acquire by *usucapio.*

(3) A must possess for the full period, but if he is B's heir,[3] and B had been in possession say for three months, A can count this in his favour, provided B acquired in good faith, even though A might be aware of the flaw in B's title (the reason being that the heir was regarded as continuing the *persona* of the

[1] G. ii. 59. [2] *Supra*, p. 146.
[3] Either *heres* (civil heir) or *bonorum possessor.*

deceased). Consequently, *e.g.*, in the case of a movable, A may complete *usucapio* in nine months, and this privilege of *accessio temporis* or *possessionis* was extended by Severus and Caracalla to a purchaser, who could count his vendor's time, but only if the purchaser as well as his vendor was in good faith.

(4) There must have been no interruption (*usurpatio*); *e.g.* if A is usucapting a slave who runs away, or a garment which he loses, he must begin over again without counting his former possession, when he regains the slave or garment. This is natural *usurpatio*; but if X brought an action against A, claiming the slave was his, and obtained judgment in his favour, this was a civil *usurpatio*.

(5) Some things could not be usucapted. Examples are—

(*a*) *Res extra commercium*, such as land in the provinces (*provincialia praedia*), for they belonged to the Roman people or the Emperor,[1] free persons (even though *bona fide* believed to be slaves), and things sacred and religious.

(*b*) Anciently, says Gaius,[2] *res mancipi* belonging to a woman under her agnate's *tutela*, unless they had been delivered with her tutor's *auctoritas*.

(*c*) Under the XII Tables and the *lex Atinia*, *res furtiva* (stolen property), and under the *lex Julia et Plautia*, *res vi possessa* (property taken by violence). Of course the original wrongdoer could not usucapt even apart from these statutes, for he had not the *bona fides* which was necessary for usucapion; the statutes, therefore, aim at some subsequent possessor and deprive of the advantage of *usucapio* even a

[1] G. ii. 7. [2] G. ii. 47.

person who has purchased from the thief for full value and without any knowledge of the defect in his title.[1] The *vitium furti* (flaw of theft) which barred usucapion was purged if the owner knew where the thing was and could vindicate it. Gaius tells us it is not often that *usucapio* operates in the case of movables, for in Roman law everybody who, knowing a thing is not his own, sells or gives it to another, commits a theft.[2] But sometimes *usucapio* may take place owing to the absence of any fraudulent intention on the part of the seller or donor; *e.g.*—

(i.) C lends or deposits a horse with B. B dies, and D, his heir, sells or gives the horse to A. D has not committed *furtum* and A can, if ignorant of the circumstances, usucapt.

(ii.) B has a life interest (usufruct) and C the *dominium* in a female slave. Her offspring, as already stated, belong legally to C. B, under a genuine mistake of law, thinks the child is his as part of the *fructus*, and sells or gives it to A. B has not stolen the child,[3] and A can usucapt. The general principle underlying these cases is that if both parties are in good faith the vendor does not commit *furtum*, and the buyer can usucapt. In the case of land, as there can be no *furtum fundi*, the seller cannot make the land a *res furtiva*; hence in all cases of sales of land the buyer in good faith can usucapt.

Further examples of property which could not be acquired by *usucapio* are—(*d*) immovables in Italy forming part of a *dos*; (*e*) bribes taken by public

[1] The defect (*vitium*) attaching to a thing once *furtiva* or *vi possessa* could only be cured by the thing getting back to the power of its former owner, or if he knew where it was (J. ii. 6. 8).

[2] G. ii. 50.

[3] *Furtum enim sine adfectu furandi non committitur* (G. ii. 50).

officials under the *lex Julia repetundarum*; and, under the later law, (*f*) the property of minors; (*g*) the property of the *fiscus* or of the Emperor; (*h*) immovables vested in churches or pious foundations.

(6) A must have *bona fides*; that is, he must not know that the property really belongs to another, owing to a reasonable mistake of fact, which must exist at the moment when possession begins. Subsequent knowledge of some flaw does not ordinarily hinder acquisition. *Bona fides* is presumed till the contrary is proved.

(7) There must be *justus titulus*, *i.e.* there must be some ground of acquisition recognised by the law (*justa causa adquisitionis*), *e.g.* sale or legacy. For instance, it is a *justus titulus* if A has bought and received delivery of a *res mancipi* but has failed to have it conveyed to him by *mancipatio*. If A is in the wrong, and thinks there is a *justa causa* when, in fact, there is not, *e.g.*, gets possession of a thing which he thinks he has bought, whereas he has not, *usucapio* does not operate (*Error autem falsae causae usucapionem non parit. Veluti si quis, cum non emerit, emisse se existimans possideat*).[1] But this doctrine is subject to qualification, and where 'the facts are such as to justify the belief in the existence of a title', *usucapio* may sometimes be based, as Professor Sohm points out, upon *bona fides* alone.[2] Examples of this, which is confined to sale, are where a person sells believing he has a right to do so, when in fact he has not, to one who takes in good faith.[3] In all other cases there must be a real *causa*; a *causa putativa*,

[1] J. ii. 6. 11. [2] Sohm, pp. 320 and 321.
[3] See the cases on p. 164 under (*c*), examples (i.) and (ii.).

or one honestly believed to exist, will not do, though it suffices for *traditio*.

Whatever may have been the case in the early law, in the time of Gaius *usucapio* seems to have had a comparatively limited application. Its main object, then, was not so much to enable *dominium* to be acquired as to *add* the element of legal ownership to a possession which was already *dominium* in everything but name ; in other words, the ordinary object of *usucapio* was to cure the technical flaw which arose when a *res mancipi* had been transferred for some valid reason (*e.g.* a gift or sale), but the form of a *mancipatio* or *in jure cessio* had not been gone through, and therefore the bare legal ownership was left in the transferor ; this ownership (*nudum jus Quiritium*) was, by *usucapio*, divested from the transferor and vested in the transferee. But although this was the normal object of *usucapio* as described by Gaius, there were cases where it did more—where it cured a substantial and not a mere technical flaw in the possessor's title, viz. where he had acquired from a person who was neither *dominus* of the thing in question nor a person (such as a mortgagee with power of sale) who, though not *dominus*, had a right to convey. This kind of *usucapio* rarely occurred, as already stated, in the case of movable property, because conveyance by a non-owner usually implied theft, but to this there were exceptions, as in the cases already put of the heir and the *usufructuarius*. And in the case of immovable property, *usucapio*, more frequently than with movables, served to cure a substantial blot in title. C, as Gaius tells us,[1] is the owner of land, and by his negligence or absence, or by his death without leaving

[1] G. ii. 51.

a successor, leaves it unoccupied. B enters and, of course, cannot usucapt because he has not *bona fides*: he knows it is the property of another;[1] but if B transfers the land to A (*e.g.* sells it to him), and A has no knowledge of the facts, A can usucapt, although he bought from a non-owner, and so cure the substantial flaw in his title.[2]

Gaius also describes three cases where a man can usucapt although he himself knows the property belongs to another, a species of *usucapio* which is called *usucapio lucrativa: nam sciens quisque rem alienam lucrifacit*,[3] *i.e.* because, knowing the property is not his own, a man makes himself richer (by *usucapio*) at another's expense. The cases in question are—

(*a*) *Usucapio pro herede.* B dies, leaving no *necessarius heres*.[4] A may enter upon the possession of his estate or any part of it before the *extraneus heres* accepts, and after possessing it for a year may become owner.[5] The period is only a year, even if the estate comprises immovable property, which usually required two years, for the lawyers in considering an *hereditas* did not regard its constituent parts but looked at it as an abstract legal unity, *i.e.* a *res incorporalis*; it was not therefore a *res soli*, requiring under the XII Tables the longer period, but one of the *res ceterae*, for which one year was enough. For the existence of *usucapio pro herede* the following reason may be gathered from Gaius. A *necessarius heres* was so called because the law gave him no option; there

[1] Land cannot be stolen.

[2] Justinian altered the law: unless all the facts were known to the owner, thirty years were to be necessary to give A *dominium*; if they were known, ten years (the ordinary period in Justinian's time) were enough.

[3] G. ii. 56.

[4] P. 219.

[5] Cf. the general occupant in English law.

could be no question of his refusing to act, and accordingly he had to perform the *sacra* and to answer to the creditors of the deceased in any event. In such a case there was no necessity for *usucapio pro herede*, which, in fact, had no application. If, however, the *heres* were not *necessarius*, but an *extraneus*,[1] he did not become heir until he signified assent, and *usucapio pro herede*, accordingly, afforded a reason why he should hasten to accept the heirship, so that there might be some person at the earliest possible moment to carry on the religion of the family and to pay the debts. Gaius tells us, however, that in his time this kind of *usucapio* was no longer lucrative (*sed hoc tempore jam non est lucrativa*[2]); which is accounted for by the fact that soon after the time of Cicero the lawyers refused to sanction the theory that a *hereditas* as a whole could be acquired in this way, although individual items of it (such as a slave or a horse) might, and by the further fact that, by a *S.C.* in the time of Hadrian,[3] it was provided that even after the *usucapio* was complete the real heir might recover the *hereditas* or any item of it from the acquirer, whose title, however, remained good against third persons, *i.e.* any person except the heir, who tried to eject him.

(*b*) The second kind of *usucapio lucrativa* was *usureceptio; i.e.* getting back by *usus* or *usucapio*[4] the ownership of property which one once owned. A has transferred property either by *mancipatio* or by *in jure cessio* to B, so that B becomes legal owner or *dominus*, but the transfer is coupled with a trust (*fiducia*) in A's

[1] See p. 220. [2] G. ii. 57.

[3] Gaius says that the *S.C.* in question was passed in Hadrian's time. It has been conjectured, but it is by no means certain, that it was the *S.C. Juventianum.*

[4] Under the old law *usus* had the same meaning as *usucapio.*

favour, either—(*a*) that B, to whom the property has been conveyed as security for a loan (*fiducia cum creditore*), will reconvey to A when the loan is repaid, or (*β*), there being no loan, that B, to whom the property has been conveyed for safe custody (*fiducia cum amico*), will reconvey on request. Then, in either case, if A happens to get possession of his property again, he will become owner in a year (even though the property is land) by *usucapio*; but in case (*a*)—of the loan—this will only happen (i.) if A has paid the debt, or (ii.) if, not having paid the debt, A has got possession in some way which does not involve either having leased the property from B, the creditor, or having obtained it from him at A's request and during B's pleasure.[1]

(*c*) The last case of *usucapio lucrativa* is another species of *usureceptio*, viz. *usureceptio ex praediatura*.[2] A's land has been mortgaged to the State, and the State has sold the land to B. If A regains possession of the land he becomes owner again in *two* years. This *usureceptio* is called *ex praediatura*, because B (the purchaser from the State) was called a *praediator* (*nam qui mercatur a populo praediator appellatur*—G. ii. 61).

Inasmuch as land in the provinces was a *res extra commercium*, and therefore unprotected by *usucapio*, imperial constitutions devised an analogous means of securing long possession against disturbance, by means of what was known as *longi temporis praescriptio* or *possessio*, a method which was extended so as to embrace movable property as well,[3] and to

[1] G. ii. 59-60.
[2] See Roby, i. 478, for a very full explanation.
[3] By Caracalla.

include *peregrini* who, not enjoying the *jus commercii*, could not benefit by the *jus civile* institution—*usucapio*.[1] *Praescriptio longi temporis*, though it had the same object as *usucapio*, effected it in a different manner. In the latter possession for the given period confers *dominium*. *Praescriptio longi temporis*, in its early form, did not: the holder was protected by the extinction of the plaintiff's right of action. Suppose, *e.g.*, that A was in possession in good faith, and could show *justus titulus*, that there was nothing against his possessing the thing in question (*e.g.*, it was not a *res furtiva*), and that he had been in possession for a sufficient time. Then, if sued by B, a person claiming the land, A could insist upon having a *praescriptio* placed at the head of the *formula* by which the action was tried, to the effect that B was not to succeed if it were proved that A had, in fact, enjoyed the property for the necessary period—the period being ten years *inter praesentes* (*i.e.* if both A and B lived in the same province), twenty *inter absentes* (*i.e.* if they lived in different provinces). But probably long before Justinian it extinguished the plaintiff's title instead of merely barring his action.

In Justinian's time the old *usucapio* in two years of immovables had become practically obsolete, because almost all land was *solum provinciale*, and he accordingly amended both the civil law of *usucapio* and also the law of *possessio longi temporis*, embodying the two ideas in one system: he enacted—

(i.) That *usucapio* of movables should continue as theretofore; the necessary period, however, being three years instead of one year.

[1] The extension to *peregrini* was probably the work of the *praetor peregrinus*.

(ii.) That all land, whether a *fundus Italicus* or *provincialis* (for he abolished the distinction), should be acquired, no longer by *usucapio*, but by *longi temporis praescriptio*, the periods being ten or twenty years, as above stated.

(iii.) That thirty years' possession (*longissimi temporis praescriptio*) of property (whether movable or immovable) was to give *dominium* to a *bona-fide possessor*, although he had no *justus titulus*, and even though the thing had been originally stolen, provided violence had not been used.[1]

IV. *Donatio.*—*Donatio* or gift is not treated as a mode of acquisition by Gaius, and Justinian would have been more logical had he omitted it. A gift has two aspects: where the intention to give and the gift are simultaneous the gift is, obviously, not a *modus acquirendi* but a *justa causa* for *traditio*; if the case is merely one of a promise of bounty it would, so far as actionable, be more properly treated under the law of contract. Further, as Dr. Moyle points out,[2] a gift does not necessarily take the form of transferring *dominium*; it may, *e.g.*, consist in the release by a creditor of a debt owing to him. Justinian speaks of gift as a mode of acquisition, but this is not so; it is merely a *justa causa* for the *traditio* which transfers the ownership. He was perhaps misled by the changes he made in the *pactum donationis*, a mere agreement to give, which, without legal force under Gaius, put the donor under Justinian under a legal obligation to make delivery; but it was the latter that operated to pass ownership. There were a few exceptional cases where the owner-

[1] C. 7. 39. 8. [2] Moyle, p. 232.

ship passed without delivery as a matter of special legislation, but these cannot affect the general principle.

Under this title Justinian discusses two distinct forms of donation: *donatio mortis causa* and *donatio inter vivos* (including *donatio propter nuptias*, which has been described already).

A *donatio mortis causa* was a gift in anticipation of and conditional upon death, and in the time of Justinian it had to be completed by delivery; but if it were made in the same form as that required for codicils, with five witnesses, it would operate as a legacy to transfer the property upon death.[1] The *lex Cincia de donis* (*infra*) had no application to it. A, who expects to die, wishes himself rather to keep some piece of property than that the donee, B, shall have it, but prefers that B shall have it rather than the heir.[2] Such a gift, effectuated by delivery, might take one of two forms: A may give the *dominium* of the object to B at once, subject to the condition that the *dominium* is to be retransferred to A if he does not die, or A may merely give B the possession of the object, B's acquisition of the *dominium* being conditional on A's death. Inasmuch as a *donatio mortis causa* was revocable at any time before death, it was unlike a *donatio inter vivos*, which, as a general rule, could not be revoked; and since a *donatio mortis causa* took effect, at any rate in possession, at once, it was unlike a legacy, which did not take effect until the donor had died and the heir had entered. Formerly there were many differences in the way in which

[1] See, for the details of Justinian's enactment, Cod. viii. 56. 4.

[2] *Cum magis se quis velit habere, quam eum, cui donatur, magisque eum cui donat, quam heredem suum* (J. ii. 7. 1).

donations of this sort and a legacy were treated; *e.g.* they were not subject to the *lex Falcidia*, or to the *leges Julia et Papia Poppaea*; but these differences were gradually removed, donations *mortis causa* being made subject to the same rules as legacies, and in Justinian's time so few were left that he was led to state *hae mortis causa donationes ad exemplum legatorum redactae sunt per omnia*,[1] a statement which needs qualification, since some differences still existed, the most important of which were (*a*) the essential distinction that whereas a *donatio* took effect at once, a legacy did not until the heir entered, (*b*) a *filiusfamilias* could, with his pater's assent, make a good *donatio mortis causa* out of his *peculium profectitium*, though he could not bequeath it.

Donatio inter vivos.—It would seem that under the old law there were only three ways in which a gift of this sort could be made. A wishing to benefit B—

(i.) Might make over the subject-matter of the gift by *mancipatio* or *in jure cessio*, or by *traditio*, if *nec mancipi*, for all of which *donatio* was a *justa causa*; or

(ii.) A might bind himself to make the gift by the formal verbal contract *stipulatio*; or

(iii.) If B were his debtor, A might release the debt by *acceptilatio*.

In other words, a mere informal agreement to give had no more effect in early Roman law than it has in England to-day. The *lex Cincia* (*circa* 204 B.C.) prohibited (except in the case of gifts in favour of near relatives and patrons) all gifts beyond a certain (but unknown) amount, and seems to have required all gifts over that amount to be actually transferred (by *mancipatio*, effectuated by *traditio* or the like),

[1] J. ii. 7. 1.

otherwise they were to be revocable by the donor, but there was no other penalty, so that the law has been described as of imperfect obligation (*lex imperfecta*). It follows that if the gift had been conveyed and delivered, even though delivery alone might not suffice to transfer the ownership, the *lex* could have no operation, but if the property forming the gift had been, say, mancipated but not yet delivered, though the ownership passed, yet if the donor changed his mind and refused to deliver, thus forcing the donee to vindicate, such *vindicatio* could be defeated by the donor by the *exceptio legis Cinciae*, but not by his heir (*morte Cincia removetur*). Antoninus Pius provided that, as between parents and children, a mere informal agreement should be actionable. Gifts exceeding 200 solidi were required to be registered in the *acta* by Constantius Chlorus unless made in favour of people excepted from the *lex Cincia*,[1] but these too were brought under the ordinary rule by Constantine, who required registration for all gifts. Justinian considerably modified the law.

(1) He seems to have generalised the provisions of Pius, not confining these to children. A *pactum donationis* was to be binding. Hence in the case of a *res corporalis* the donor was under a duty to make *traditio*, and in other cases the promise was made enforceable by action.

(2) The gift was only to require registration if it exceeded 500 solidi, and certain gifts, even though of greater amount, were valid without registration; *e.g.* to redeem captives, or made by or to the Emperor. Gifts requiring registration and not fulfilling the requirement were only void as to the excess.

[1] But see Girard, pp. 994-999.

(3) He simplified the law as to revocation (which had previously been exceptionally allowed) by providing that any donor might revoke, but only for the legal reasons Justinian specified; *e.g.* where the person to whom a gift had been made on condition failed to comply with it, or where he was guilty of gross ingratitude.[1]

V. *Lex*, or title by statute. Ulpian,[2] who alone gives this heading, states that we acquire property in a lapsed (*caducum*) or forfeited (*ereptorium*) testamentary bequest by virtue of the *lex Papia Poppaea*, and in a legacy by the XII Tables. These subjects will be considered later, in discussing universal succession by will.

VI. *Adjudicatio* is the award of a judge in a suit for partition. If two or more persons are co-owners of property (*e.g.* as heirs or partners) they may, if *sui juris* and competent to act, agree how the property is to be divided up, so that each may, instead of being co-owner of the whole, become sole owner of part, and having come to this agreement they will carry it out by each conveying (*e.g.* by *mancipatio*) to the others the shares respectively allotted to them. But if they cannot agree, or are under disability, the assistance of the law court is necessary and the judge will decide how the property ought equitably to be divided, and will then by his award (*adjudicatio*) vest

[1] At the end of this title Justinian mentions what he terms another mode of acquisition under the old civil law, viz. *per jus adcrescendi*. He refers to the old rule, that if one of several masters manumitted a slave without the consent of the rest he lost his share in the slave. The subject seems hardly important enough to deserve separate mention as a *modus acquirendi*.

[2] Reg. xix. 17.

in each, without any conveyance, the share which it is decreed he shall receive. *Adjudicatio* is, therefore, a mode of acquiring property, because the award gives A what previously belonged to A, B, and C.

Section IV. Rights in Rem over the Property of Another

Up to this point the acquisition of *res singulae* has been discussed from the point of view of acquiring the entire ownership of the thing. We have now to consider how a man may have a right *in rem* with respect to property owned by another; in other words, we have to deal with *jura in re aliena*.

These rights in another's property, though they may arise from contract, must be distinguished from rights *resting merely on contract*, for if the right is of this latter kind, as where B borrows a book from A, it confers only a right *in personam*, *i.e.* against the lender, whereas the *jura in re aliena* now under consideration imply that the ownership itself is in a sense split up. Though the *dominium* remains in the person whose property is subject to the right, this right, which is ordinarily among those which are the consequences of ownership, has become detached from the owner and vested in one who is not the owner, and so limits the owner's rights with respect to his property, such right being *in rem*. If, *e.g.*, A has the right (*jus in re aliena*) of walking over B's field, though the field remains in the ownership of B, his full rights as owner are diminished, *pro tanto*, by A's right, and this right A can assert not only against B but against anyone who interferes with its exercise. The exist-

ence of a *jus in re aliena* then requires (1) that A is the owner of some *res corporalis*; (2) B has a right or rights with respect to A's property; (3) which are *in rem*; and (4) fetter in some way the full rights of ownership which ought to be A's.

The *jura in re aliena* recognised by Roman law are—

(1) Servitudes.
(2) *Emphyteusis.*
(3) *Superficies.*
(4) *Pignus* and *hypotheca.*

Subsect. 1. Servitudes

A servitude is a *res incorporalis*, and may be defined as a proprietary right vested in a definite person or annexed to the ownership of a definite piece of land, over land or other property belonging to another person, and limiting the enjoyment by that person of his property in a definite manner.

General principles of servitudes.

1. A servitude can be considered from two points of view, that of the person entitled to it, and that of the person (or property) subject to it. Viewed from the standpoint of the latter, there is never any duty to do something, but either to permit the former to do something where the servitude is positive, *e.g.* to exercise a right of way, or not to do something which but for the servitude he would be entitled to do (negative servitude), *e.g.* not to build so as to obstruct the light which the dominant tenement is entitled to receive: *Servitutium non ea natura est, ut aliquid faciat quis . . . sed ut aliquid patiatur aut non faciat.* There seems to be one exception, for in the case of

a right of support (*servitus oneris ferendi*) there was a duty to keep the wall in repair. But this duty may not be part of the servitude, or else the case is anomalous.

2. A servitude can only exist over another's property : no man can have a servitude over his own property. Thus if A, the owner of Blackacre, has a right of way over a neighbouring property called Whiteacre, owned by B, then, if A were to buy Whiteacre, the servitude would be extinguished : *nulli res sua servit.*

3. A servitude can only exist over tangible property, and not with respect to a mere right, *Servitus servitutis esse non potest* : there cannot be a servitude of a servitude.

4. As there can be no justification for imposing a burden upon a person or his property unless there is a corresponding benefit to some other person or property, it follows that, *Quotiens servitus nec hominum nec praediorum interest, non valet.* A servitude cannot be purely burdensome ; it must be advantageous to some person or property, or it is void. A corollary from this is the maxim *servitus civiliter exercenda est* : a servitude must be exercised with due moderation, since the law merely tolerates such restrictions on ownership as are absolutely essential in the interests of another.

Classification of servitudes.

1. *Positive and negative.*—In the former case the person entitled to the servitude may do something in relation to the servient property, *e.g.* in the case of right of way over another man's land ; if *negative*, he may restrain the owner from exercising some right which but for the servitude the owner might avail

himself of; *e.g.*, an owner of land can, *prima facie*, build to any height he pleases, but if another has the servitude known as the *jus ne luminibus officiatur* (right to light), the owner cannot build so as to obstruct his lights.

2. Besides being classified as positive and negative, servitudes may be divided into *praedial* and *personal*, and praedial servitudes are subdivided into *rustic* and *urban*.

A *praedial servitude* occurs where the owner of one property (called the *praedium dominans*) has in virtue of his ownership of that property the right to some advantage over the neighbouring property (the *praedium serviens*) of some other person. In the case of these praedial servitudes the servitude is regarded, not as annexed to the person entitled or subject to it, but as annexed to the two properties, hence *omnes servitutes praediorum perpetuas causas habere debent*; *e.g.*, *praedium* X has the right of being supported by *praedium* Y; A happens to be the owner for the time being of X, and B of Y, and therefore A enjoys and B is subject to the servitude. But after they have died or parted with their estates the servitude will go on (for it has *perpetuae causae*, being attached to the *praedia* and not to A and B merely), and will be enjoyed or borne by all subsequent owners of the two properties.

An *urban praedial servitude* is not necessarily, as the name would suggest, one where the properties are in a town; it is where the servitude is attached to *a building*, as opposed to a *rustic* praedial servitude where the servitude is attached to *land*. Examples of urban servitudes are—

(*a*) Right of support, *servitus oneris ferendi*.

(*b*) Right of inserting a beam into a neighbour's wall (*tigni immittendi*).

(*c*) The right that a man has that his neighbour shall permit rain-water from the former's house to flow into or over his premises (*stillicidii avertendi*), and the right of 'ancient lights (*ne luminibus officiatur*). Justinian speaks also[1] of a right a man has *not* to receive his neighbour's water, and in the *Digest* a *jus altius tollendi* is mentioned. It is not clear what is meant; *prima facie*, unless subject to a servitude a man has a right (which is not itself a servitude, but an ordinary right of property) that his neighbour shall not cause him damage by inundating him, and, in the same way, the owner of property has, as such, unless subject to a servitude, a clear right to build as high as he pleases. Possibly the writers of the passages mentioned, when they spoke of the right of not receiving water and the right *altius tollendi*, were confounding what may be called the natural rights of an owner of property with servitudes in the strict sense.

Examples of rustic praedial servitudes are—

(*a*) *Iter*, the right a man may have of passing on foot or horseback over another's land.

(*b*) *Actus*, the right of driving beasts, with or without carts or other light vehicles.

(*c*) *Via*, which includes the two former and authorises the use of the road for all purposes (so that no injury, *e.g.* to trees, be done); even for dragging heavy vehicles along it, which the person having the *jus actus* could not do. Further, the person who enjoyed *jus viae* could, in the absence of express agreement, insist upon having the road of the width

[1] J. ii. 3. 1.

provided by the XII Tables, viz. eight feet on the straight and sixteen feet where it turned (*flexum*) and changed its direction.

(*d*) *Aquaeductus*, the right of conducting water through the land of another.

(*e*) *Aquaehaustus*, of drawing water from another's land.

(*f*) *Pecoris ad aquam appulsus*, the right of watering cattle on another's land.

(*g*) *Pascendi*, of feeding cattle on another's land.

(*h*) *Calcis coquendae*, of burning lime, and

(*i*) *Harenae fodiendae*, of digging sand.

A *personal servitude* is where the person entitled to the right enjoys it, not as the owner of property, but because he, the individual in question, has acquired it in his private capacity. Of personal servitudes there were only four kinds:

1. *Usufructus.*
2. *Usus.*
3. *Habitatio.*
4. *Operae servorum vel animalium.*

1. *Usufructus* is defined as *jus alienis rebus utendi fruendi, salva rerum substantia*,[1] the right of using and enjoying property belonging to another provided the substance of the property remained unimpaired. More exactly, a usufruct was the right granted to a man personally to use and enjoy, usually for his life or until *capitis deminutio*,[2] the property of another which, when the usufruct ended, was to revert intact to the *dominus* or his heir. It might be for a term of

[1] J. ii. 4 *pr.*

[2] Until Justinian any kind of *capitis deminutio* destroyed the *usufruct.* Justinian provided that *capitis deminutio minima* was not to have this effect.

years, but even here it was ended by death, and in the case of a corporation (which never dies) Justinian fixed the period at 100 years. A usufruct might be in land or buildings, a slave or beast of burden, and in fact in anything except things which were destroyed by use (*quae ipso usu consumuntur*), the reason, of course, being that it was impossible to restore such things at the end of the usufruct intact (*salva rerum substantia*). But the Senate [1] permitted a *quasi-usufruct* to be created by will even in regard to things of this kind; the *usufructuarius* could not undertake to restore them, but he was made to give security and to undertake (by a *cautio*) that when the usufruct ended he or his heir would restore the capital value of the things comprised in the usufruct to the testator's heir. The destruction of usufruct by *capitis deminutio*, even *minima* before Justinian, was a cause of great inconvenience, but was circumvented by legal ingenuity. One method was to give it *in singulos annos* for every successive year, so *capitis deminutio* would only affect it for the year in which it occurred. Another method commonly employed was to accompany the gift or grant of the usufruct with a provision for successive gifts if the first terminated by *capitis deminutio*.

Duties of the usufructuarius.—In all cases the *usufructuarius* was bound to show the same degree of care in relation to the property as a *bonus paterfamilias*, and was therefore liable, as we should say, for 'waste'; [2] he could not use the property for any purpose other than the agreed one, nor alter the

[1] Probably about the time of Augustus.

[2] But not to the extent of having to rebuild what was ruinous and had fallen down from age.

character of the property; if the usufruct were of a house, the *usufructuarius* had to keep it in ordinary repair, if of a flock, to replace any of the flock which chanced to die, out of the young, which otherwise belonged to him; and he was bound to restore the property, whatever it was, unimpaired. These duties were usually secured by a *cautio usufructuaria*, the *cautio* in the case of a *quasi-usufruct* being limited, as already stated, to an undertaking to restore their value.

Rights of the usufructuarius.—He was entitled to the possession and enjoyment of the property and, although he could not, legally, transfer the usufruct to another, he could let or sell the use and enjoyment of it. He was not liable for accidental loss or damage. If the property in question were a farm he was entitled to its ordinary produce, and acquired by *fructuum perceptio* the fruits, in which were included the young of animals, but not the children of a female slave. If the property were a slave the *usufructuarius* was entitled to his services, provided they were the slave's usual work, and, as already pointed out, the *usufructuarius* acquired whatever the slave made by his own work (*ex operis suis*) or by the property of the *usufructuarius* (*ex re nostra*).

2. *Usus* was a personal servitude like usufruct, but it implied merely the *usus* or bare enjoyment of the property apart from the *fructus* or fruits, except so much of the produce as sufficed for the needs of the household. The *usuarius* was also distinguished from the *usufructuarius* in that he could not sell or let the enjoyment of the property to another. So if the *usus* were of a house, the *usuarius* might live in it himself with his wife and children, but could not permit

another to occupy it in his place. He could, however, take in paying guests.[1]

3. *Habitatio.*—It was at one time doubted whether this and the next personal servitude (*operae servorum*) were to be treated as distinct species of servitudes, but by Justinian's time it was established that they were so distinct. *Habitatio* implied the use of a house, together with the right to let it, and (unlike *usufructus* and *usus*) it was never lost by *capitis deminutio minima* or non-user.

4. *Operae servorum vel animalium* (though not mentioned in the text of the *Institutes*) constituted another kind of personal servitude, and the expression implies that the person who enjoyed the servitude had the right (like a *usufructuarius*) to the service of a slave or animal, but the differences between this servitude and a usufruct are that neither (*a*) death,[2] nor (*b*) *capitis deminutio minima*, nor (*c*) non-user operated to extinguish the right.

Servitudes: how created.—According to the civil law the normal way of creating a servitude was by—

(1) *In jure cessio* (in the case of all praedial servitudes), the fictitious lawsuit in which the plaintiff claimed that he had, *e.g.*, the right of walking over the defendant's land, and the defendant acquiesced.

(2) A rustic servitude, being a *res mancipi*, could be created by *mancipatio.*

These were both obsolete under Justinian.

(3) A servitude might also be created at *jus civile* by *deductio*; *i.e.* A makes *mancipatio* or *in jure cessio* of his land or house to B, and at the same time reserves to himself (*deductio*) a servitude in relation to

[1] J. ii. 5. 2.

[2] *I.e.* of the person entitled; but authority on this point is scanty.

it. There could be no *deductio* in a conveyance by *traditio*. Probably from a comparatively early date a servitude might also be created:

(4) By will (*testamento*), *e.g.* a testator leaves his slave (Stichus) to B, subject to a usufruct in favour of A, and this seems to have been the common way in which personal servitudes arose.

(5) A servitude might also arise from a partition suit (*adjudicatio*). A and B are co-owners of two neighbouring houses; the judge awards one to each in severalty, and gives each a right of support against the other.

(6) *Usucapio* was a means of acquiring a servitude till the *lex Scribonia* forbade it, though it is not easy to understand how a *res incorporalis* could possibly be possessed. In later law *hoc jure utimur ut servitutes per se nusquam longo tempore capi possint, cum aedificiis possint*; but, as the passage suggests, the acquisition of a building by *usucapio* carried with it any servitudes affecting it.

(7) *Quasi-traditio* accompanied by acquiescence in the exercise of a servitude first received praetorian protection and was generally recognised by Justinian.

(8) Land in the provinces being *res extra commercium*, the old methods of *in jure cessio* and *mancipatio* were obviously incapable of being used to create servitudes therein, and no *peregrinus* could acquire any servitude by a *jus civile* method. To cure these defects a new method of acquiring servitudes arose by *pact and stipulation*, *i.e.* by agreement of the parties (*pactum*) reinforced by a *stipulatio*[1] for a

[1] At first a servitude so created probably did not, like a true praedial servitude, constitute a *jus in re aliena*; like most rights created by contract, it merely conferred a *jus in personam*, but under praetorian influ-

penalty in case the pact, which was not itself actionable, was disregarded. It was followed by a *quasi-traditio* in the case of a positive servitude.

(9) We also find another method of acquiring servitudes *jure praetorio*, viz. *praescriptio longi temporis, i.e.* uninterrupted exercise of the right (*quasi-possessio*) for ten years *inter praesentes*, twenty *inter absentes*; a method, like pacts and stipulations, at first confined to provincial lands, and afterwards extended to Italy and Rome.

In the time of Justinian the difference between *solum Italicum* and *solum provinciale* was abolished, and *in jure cessio* and *mancipatio* had become obsolete methods of conveyance. The ordinary methods, therefore, of creating servitudes were—

(1) By pact and stipulation; but a servitude might also arise (2) by *deductio, i.e.* being reserved when property was conveyed to another by the then common method, *traditio*. (3) By *quasi-traditio*, followed by suffering the exercise of the right. (4) By *praescriptio longi temporis*, the period being the same as under the praetorian law. (5) *Testamento*. (6) *Adjudicatione*; and (7) exceptionally, *lege, e.g.* the father's usufruct of half his son's *peculium adventitium* after emancipation.

No *transfer* of a servitude to a third person was possible. This has already been pointed out in the case of personal servitudes, but it is equally true of praedial servitudes; they passed, of course, on alienation of the *praedium dominans*, as the liability passed on the transfer of the *praedium serviens*, but never *per se*.

ence it had come, by the time of Gaius, to confer rights *in rem*, for Gaius treats it as undoubtedly creating a servitude in the ordinary sense, at any rate for provincial land (G. ii. 31).

Servitudes end—

1. If the servitude is a personal one, by the death or *capitis deminutio* of the person entitled. *Capitis deminutio minima*, however, never produced this result in the case of *habitatio* and *operae servorum*, and under Justinian it had no effect in the case of any servitude.

2. In the case of a usufruct, by the *usufructuarius* wantonly abusing his rights (*non utendo per modum*).

3. In the case of praedial servitudes by the permanent destruction of the *praedium dominans*.

4. By destruction of the thing subject to the servitude: *est enim jus in corpore: quo sublato et ipsum tolli necesse est*; and though Justinian is here speaking of usufruct only, the statement is true of all servitudes, whether praedial or personal.

5. Merger, *i.e.* the servitude and the property subject to it become vested in the same person, the servitude is at an end, for *nulli res sua servit*. Examples of merger are—

(*a*) Where the servient owner acquires the *dominium* of the *praedium dominans*;[1] or

(*b*) Where he succeeds as *heres* to the property of the other.

6. *Non-user*. *Habitatio* and *operae servorum* were never lost in this way.[2] Under the old law non-user of a thing in usufruct or *in usu* extinguished the right in one year in the case of a movable, two in the case of immovable property, and two years non-user extinguished praedial servitudes, subject to this, that in regard to urban praedial servitudes time did not

[1] J. ii. 4. 3.

[2] The reason for their peculiarities is said to be that they were granted for maintenance.

run until the person subject to the servitude had done some act clearly showing that he treated the servitude as at an end; *e.g.* raised his house higher than the servitude permitted (*usucapio libertatis*). If the servitudes affected provincial soil the periods were ten and twenty years. These last-mentioned periods were adopted by Justinian for all cases, but in the case of urban servitudes *usucapio libertatis* was still necessary.

Subsect. 2. Emphyteusis

Emphyteusis,[1] and the two following *jura in re aliena* (*superficies* and *pignus*) are not dealt with in the text in this place (*i.e.* after Servitudes), but since all three are undoubtedly rights in other people's property it is convenient to mention them here.

Gaius, in dealing with the contracts of sale (*emptio-venditio*) and hire (*locatio-conductio*), remarks that they have so much in common that it is sometimes difficult to see the distinction between them; as, *e.g.*, when land is hired in perpetuity, on condition that so long as the rent is paid the lease is to continue; and Gaius adds that the better opinion is (*magis placuit*) that the contract is one of hire (*locatio-conductio*). A constitution of Zeno (*lex Zenoniana*), however, determined that this method of letting land was neither sale nor hire, but a special juristic transaction standing by itself, and it is known as *Emphyteusis*.

In the time of Gaius this kind of letting would occur when a municipal corporation or a college of

[1] For *Emphyteusis*, see J. iii. 24. 3; G. iii. 145. *Superficies* in this sense is not dealt with by either writer. For *Pignus*, see J. iii. 14. 4; G. ii. 60. 64; iii. 200. 204; iv. 62.

priests granted perpetual leases to husbandmen, reserving a rent in kind, but later, in the Eastern Empire, this method came to be adopted in imperial grants, and, later still, by private persons. And the right of the *emphyteuta*, from being only a contractual right, giving merely a *jus in personam* against the landlord, gradually became a right *in rem*, entitling him to defend his possession against all the world. The two branches of the institution were combined in the fifth century. The grantor or landlord retained the *dominium* of the property, which gave him the right to receive the rent from the tenant, and in certain events to forfeit the lease (*e.g.* if the rent were unpaid for three years).[1] The tenant (*emphyteuta*) could only assign with consent, and the landlord in such a case had the right of pre-emption; *i.e.* he had the right to buy the land from the tenant at the price he was prepared to sell it to the third person. The *emphyteuta* became entitled to the profits of the land by *fructuum separatio*; he could mortgage the land, and create servitudes over it and his rights passed to his heir or testamentary devisee.

Subsect. 3. Superficies

Superficies, which owes its origin to the praetor, stands to houses as *emphyteusis* to agricultural land, and represents the Roman long lease (either in perpetuity or for a long term) of land for building purposes. The lessee built the house, which thereupon (since *superficies solo cedit*) became the lessor's property. But the lessee acquired rights *in rem* to the

[1] Two years in the case of the landlord being an ecclesiastical or charitable body.

extent of his interest, and in return for the use of the land and house paid a rent.

Subsect. 4. Fiducia, Pignus, and Hypotheca

This is the Roman mortgage (real security) and in its early form (*fiducia*) bears a great likeness to the old English mortgage of real property, where the debtor, by a feoffment (or symbolical delivery of the land), made the creditor owner of it, subject to a condition that he would reconvey, *i.e.* make a re-feoffment to the debtor if he repaid the money lent (principal) and interest on a day named.

At Rome a mortgage of *res mancipi*, whether movable or immovable, was originally effected by the borrower conveying to the lender (*fiduciarius*) the property which was to secure the debt, by *in jure cessio* or *mancipatio*, so as to make the lender *dominus*. The lender then undertook by a *fiducia* to make reconveyance when principal and interest were repaid. Since he was *dominus* the lender could at law realise his security (*i.e.* sell it), pay himself out of the proceeds, and hand over the balance (if any) to the borrower; but the free exercise of this power was impeded, in equity, by the *fiducia*, which bound him, on repayment, to give the debtor his property back; he might legally sell, but if the debtor suffered damage thereby he could compel the creditor by the *actio fiduciae* (condemnation in which carried *infamia*) to make compensation. It follows that the debtor's right of redemption (*i.e.* getting his property back on repayment of everything due) was not limited in point of time, and this and the fact that *fiducia* applied to movable as well as immovable property, are the chief

differences between the Roman institution and the old English mortgage, which only applied to freehold property in land, and in which, if the day named for repayment passed, the land originally became the absolute property of the creditor (mortgagee). A similar effect with respect to redemption, however, might be produced at Rome by special agreement (*lex commissoria*), providing that the *fiducia* was to become void in default of payment at an agreed date. It is obvious that in this form of security the mortgagee acquired rights of wide extent; he became, in fact, more than a person with a *jus in re aliena*, for he was *dominus*, save so far as the *fiducia* limited his ownership. But in spite of the one clear advantage, that the debtor could not deal with his property to the detriment of the lender (*e.g.* by fraudulently creating a second or third mortgage), there were many defects attaching to *fiducia* as a form of security. Since it was carried out by means of the civil law conveyances it had no application to *peregrini* or to land in the provinces; further, *fiducia*, at any rate at law, placed the debtor very much at his creditor's mercy, for although he could get compensation under the *fiducia* from the creditor who, *e.g.*, unfairly sold, he could not 'follow the property', *i.e.* get it back from a third person who had bought it; and, in strict law, he became, at best, from the moment of conveyance tenant at will (*precario*) to his creditor.[1] It applied only to *res mancipi*, since a *fiducia* could only be attached to the conveyances by which these were transferred.

The next form of mortgage is *pignus*, *i.e.* a real

[1] A mortgagor in England, where the mortgage is a *legal* mortgage, was till recently in exactly the same position.

contract. Here the borrower made *traditio* of the thing pledged, and the creditor acquired, not, as before, *dominium*, but possession of the object in question, such possession being protected by interdicts provided by the praetor. Probably the older form was replaced by this, when by the introduction of interdicts in the praetor's edict, possession came to be recognised and protected as such, *i.e.* apart from the element of *dominium*. This kind of mortgage was less formal and cumbrous than the older method, and though clearly to the advantage of the debtor (for he retained the *dominium* of his property) was not very favourable to the lender, who was not entitled to the use [1] of the property in mortgage (*itaque si . . . creditor pignore . . . utatur . . . furtum committit*),[2] and had no right of sale in the absence of agreement; so that it was sometimes specially agreed—(*a*) that the creditor might sell, in which case he could convey the *dominium*, the debtor receiving any surplus money there might be; or (*b*) by a *lex commissoria*, that the property (*i.e.* the *dominium* of it) was to become the creditor's if the loan was not punctually repaid. A further defect of this kind of security was that though some things might be mortgaged in this way (*e.g.* land in the provinces) which could not have been mortgaged by the old *fiducia*, yet it was still impossible to give as security anything which was incapable of physical delivery, and it was equally impossible to mortgage the same thing to two different persons (*plures eandem rem in solidum possidere non possunt*). In this form the creditor's right may be described as a

[1] *Antichresis* was a form of *pignus* where the lender might take the fruits and profits by way of interest.

[2] J. iv. 1. 6.

qualified *jus in re aliena*; it was not a strict right *in rem*, because he had not the *actio in rem* against third persons, but he had possession and could have recourse to the ordinary interdicts.

Hypotheca (which was a *pactum praetorium*[1]) was a form of mortgage resting merely on agreement, neither the *dominium* nor the possession passing to the creditor, first introduced as between landlord and tenant (as a means by which the latter could mortgage his property and crops to secure his rent) and subsequently extended to all cases. Its essence is that the creditor can claim possession from the debtor if necessary by an interdict; can assert his rights by an action *in rem* against third parties,[2] and has a right of sale. The chief advantages of *hypotheca* as opposed to the older forms were—(α) the borrower kept possession of his property, but the lender was adequately secured; (β) many more objects could be pledged, *e.g.* a slave-child yet unborn; (γ) a general charge could be created, *i.e.* over the whole of a person's property, and was sometimes implied (*i.e.* although there was no express agreement) by law (*tacita*), *e.g.* in the case of the married woman in respect of her *dos*. Such a charge was also implied in favour of the landlord of a house, who had a *tacita hypotheca* to secure his rent over things *invecta et illata*; and the landlord of a farm had a like charge over his tenant's crops. On the other hand, this method of creating security made frauds on the part of the borrower far easier than under the ancient method of *fiducia*.

Hypotheca having thus many advantages over

[1] P. 346.

[2] So that the creditor had a true *jus in re aliena*.

pignus its rules came gradually to be applied to that kind of security also. In the time of Justinian the mortgage by way of *fiducia* had entirely disappeared, and the relation created by *pignus* and *hypotheca* was exactly the same, save that in the former possession passed, whereas in the latter it remained with the borrower. The borrower's action to enforce his rights was the *actio pigneratitia*; the lender had—(1) the interdicts *Salvianum* and *quasi-Salvianum* to get possession of the property; (2) the *actio Serviana* and *quasi-Serviana* to enforce his security at law. The *interdictum Salvianum* and the *actio Serviana* were applicable only to landlords; the *interdictum quasi-Salvianum* and the *actio quasi-Serviana*, later called *actio hypothecaria*, availed any kind of creditor. By the time of Ulpian the right of sale had become implied in every mortgage (instead of resting on express agreement), and, in Justinian's time, could be exercised—(*a*) provided the agreed day had passed and notice requiring repayment had been given, followed by two years' default, and (*β*) the sale must be *bona fide*, and no interested person must bid. Any surplus belonged to the borrower. It remains to notice that the old *lex commissoria* providing for foreclosure, *i.e.* that the borrower was to lose his right to redeem on failing to make punctual payment, after being declared void by Constantine, was reintroduced in a modified form by Justinian, *e.g.* where a sale was impossible.

Owners who could not alienate.—Usually the right of alienation is an integral part of ownership, but considerations of public policy may dictate restrictions. Thus a *pupillus* could not alienate without the *auctoritas* of the tutor, which was also necessary

in the case of a woman *in perpetua tutela* with respect to *res mancipi*. *Furiosi* and *prodigi interdicti* were prohibited from alienating. The husband who was the owner of dotal land was under the same prohibition. A *res* which was the subject of litigation (*litigiosa*) if alienated, might give rise to a *restitutio in integrum*. Property transferred subject to an express agreement that it was not to be alienated, and property, the ownership of which might be determined by the fulfilment of some condition, were, in the former case, not alienable, though Justinian made certain changes if it was given under a will, and, in the latter, alienation could not affect the destination of the property on the determination of the condition.

Non-owners who could alienate.—Tutors and curators under the circumstances already noted; persons in power duly authorised to make an alienation, but with certain restrictions as to the method to be employed; the *creditor pignoris* (pledgee), at first by express agreement, later the power was implied. The most important case was where an *extranea persona* authorised by mandate effected the sale. This was probably not at first possible, but by the time of Gaius the *procurator*, who had a general and not merely specific authority, could effect the alienation and give title.

Acquisition through others.—In the case of persons in power, like the slave or the *filiusfamilias*, all acquisitions went to the *dominus* or *paterfamilias*, subject to the rules about the son's *peculium* already considered. Wives *in manu* and persons *in mancipii causa* were in the same position. A slave in usufruct, acquired for the usufructuary in two cases, by his labours, and out of the property of the usufructuary;

in other cases the acquisition was for the *dominus*. But the case of the *extraneus* (procurator) needs special attention. Originally acquisition of neither ownership nor possession could be acquired through *extraneae personae*. So if I commissioned B, a person not in power, to buy a plough for me, when he bought it it was his ; he had to make a second *traditio* to me before I could become owner. If he sold it to someone else instead, I could not claim it, though I had a remedy against my agent on the contract (*mandatum*) between us. But I could possess through an *extranea persona* something I had acquired and which he held for me. Labeo favoured the acquisition of possession through an *extraneus*, but Gaius denied that any acquisition could be made through him. With the growth of commerce the rule became too inconvenient to stand, so by the time of Paul and Ulpian you could acquire possession through an *extranea persona* and, therefore, also ownership, provided he acquired from an owner or the duly constituted agent of one ; if not, possession was acquired, and through this, by usucapion, ownership. But the principal did not begin to acquire possession till he knew of its acquisition by his agent. Severus put the rule laid down by Paul and Ulpian on a statutory basis.[1]

Section V. Universal Succession

Universal, as opposed to singular, succession means that one acquires, not a single *res*, whether *corporeal* (as a slave) or *incorporeal* (as a servitude), but an aggregate of rights and liabilities called a *juris uni-*

[1] J. ii. 9. 5.

versitas. The universal successor assumes the whole of the legal clothing of the person to whom he succeeds; steps, as it were, into his shoes. He takes over his rights and liabilities of every kind; his property (*res singulae*), *jura in re aliena*, debts, and other obligations (such as rights of action for damages for breach of contract) owing to him, and the debts and obligations which he himself owes. All these make up the *juris universitas* (which is viewed as an abstract legal thing, a *res incorporalis*) which will pass to the successor, save that some few rights and obligations may be so personal to the individual concerned that they become extinguished altogether. Gaius tells us that universal succession takes place if we have become heirs to anyone (which may be under a will or on an intestacy), or if we have obtained a grant of *bonorum possessio*, or have bought the estate of an insolvent, or have taken anybody in adrogation, or married a woman by a mode by which she passed *in manum*.[1] As a matter of fact the *universitas juris* passed whether the woman were married really, or merely fictitiously by a *coemptio fiduciae causa*. There was also another kind of universal succession in the time of Gaius, though he does not here refer to it, viz. *in jure cessio hereditatis*.

Finally, as Justinian points out, a new kind of *successio per universitatem* was introduced by Marcus Aurelius, viz. *addictio bonorum libertatis causa*; and Justinian also notices as obsolete the ancient form under the *S.C. Claudianum*.

All these forms of universal succession will be considered or mentioned in the following order:

[1] G. ii. 98.

1. Testate succession.
2. Intestate succession.
3. *Bonorum possessio.*
4. *Addictio bonorum libertatis causa.*
5. *In jure cessio hereditatis.*
6. (*a*) Bankruptcy.
   (*b*) Adrogation, marriage, and coemption.
   (*c*) The *S.C. Claudianum.*

Subsect. 1. Testate Succession

It is necessary to consider under this head—

A. (i.) How wills were made; (ii.) What was a codicil.

B. The contents of wills, and rules to be observed in drawing them up.

C. Who could make, witness, or take benefits under them—*testamenti factio.*

D. How a will might become invalid.

A. (i.) *How a will was made.*

There can be little doubt that the earliest form of succession on death was not testate, but intestate succession. Early law knew nothing of the *individual*, it was concerned with the group, whether the tribe, the *gens*, or the family. In early Roman law the unit of the State was the family (earlier still it was, possibly, the *gens*). Of each family the *paterfamilias* was the head; he represented what Sir Henry Maine termed the small corporation, and managed its property and affairs. But although he managed the property, it *belonged* to the family, and it would not only have been opposed to the ideas, but would have destroyed the very organisation of early

society had the *paterfamilias* been able at his death to give the property of the family away to another family or group. As Sir Henry Maine shows, however, a time must come when these ideas weaken, when the individual begins to get a status apart from his family; and, accordingly, the old conception at a comparatively early date became qualified. The property, instead of being considered as vested in the family, with the *paterfamilias* as manager, is treated as belonging to the *paterfamilias*, subject to certain claims on the part of the family which he can with difficulty defeat. It is not a matter for surprise, accordingly, to find that at Rome the earliest form of will was one sanctioned by a legislative act of the *populus*—the *testamentum calatis comitiis*. Twice every year the Roman people met in the *Comitia Curiata* for the purpose (*inter alia*) of giving assent and validity to the wills of the citizens.

The will was made orally, and was probably only an exceptional expedient resorted to when there was a prospect of a failure of heirs in the direct line to continue the family succession and to undertake the duty of attending to the family *sacra*. At first, probably, the term 'will' for the proceedings is a misnomer; in fact, they amounted, not to a testament, but to an adrogation.[1] A is an old man with no descendants in his power (*i.e.* no *sui heredes*[2]); if he dies his property will go to his *agnates*, or, failing them, to his *gens*. He accordingly takes, by adrogation, B into his family as his *filiusfamilias*. On his death B, in the ordinary course of things, will become

[1] It will be remembered that adrogation was also effected in this *Comitia*.

[2] P. 210.

A's *suus heres*, and succeed him to the exclusion of A's *agnates* and of his *gens*. The comitial will is probably merely an extension of this idea, enabling a man to nominate an heir to succeed on his death, a sort of *post-obit* adoption. The other form of will, in early times, was the *testamentum in procinctu*, the will made orally before the *populus*, no longer assembled in *Comitia*, but drawn up in battle array, a form of testament probably as limited in its operation as that made *calatis comitiis*.

In course of time a third kind of will was evolved by the plebeians, who could not make a will in *calatis comitiis*, which was the ordinary form for all when Gaius wrote, and which, like a will in its modern conception, became *secret* and *revocable*; this was the will *per aes et libram*, the will made by means of a mancipation or fictitious sale.

In its earliest form the proceedings were as follows: A, who is about to die,[1] sells for a nominal price his *familia*, *i.e.* all his property, to B, the *familiae emptor*, or heir, and charges B to carry out his last wishes, which he orally communicates, *e.g.* with regard to the legacies;[2] these oral directions being known as the nuncupative part of the will.[3] In this stage, of course, the will is neither secret nor revocable; and, what is more striking still, it operates, not on A's death (as a modern will), but at once. B has by a sale *inter vivos* bought A's *hereditas*, and A, if he recovers, may be dependent upon B (unless, as suggested by Muirhead, there was a *fiducia* to allow A the

[1] *Si subita morte urguebatur* (G. ii. 102).

[2] Gifts of specific items of property to relatives and friends.

[3] Every will made *per aes et libram* consists of two distinct parts: the *mancipatio* or fictitious sale, and the *nuncupatio* or oral directions: *Nuncupare est enim palam nominare.*

enjoyment of his property during his lifetime).[1] In its next development, though the will is still public and, probably, irrevocable, it does not operate until A's death, when B, the *familiae emptor*, becomes his heir, and carries out such directions as to legacies and the like as A, the testator, had charged upon him in the *nuncupatio*. But by the time of Gaius (when the two early kinds of will were already out of date) a great change had taken place in the mancipatory will (*sane nunc aliter ordinatur quam olim solebat*[2]); the *familiae emptor* is no longer the heir, but a mere figure,[3] to enable the mancipation to be carried out; the real heir, upon whom the legacies are charged, being the person named by the testator, either orally in the *nuncupatio*, or, as was nearly always the case, in the written will. Accordingly, in classical times, the will *per aes et libram* might be secret; it could be revoked, and it did not operate until death.

The actual proceedings, as may be gathered from Gaius, were as follows: First,[4] the testator had his will drawn up on tablets, often by a skilled lawyer, and in it the *heres* was instituted, legacies bequeathed, and the other customary directions given. This in England to-day would amount to a legal will if duly signed by the testator as his last will in the presence, and with the signatures, of two witnesses. At Rome, however, a document so executed would, as a will, have been void. In order to make the will effective, to make it a *legal* will, the whole ceremony of a mancipation had to be solemnly performed. Accordingly,

[1] Cf. Muirhead, p. 150.

[2] G. ii. 103.

[3] *Alius dicis gratia propter veteris juris imitationem familiae emptor adhibetur* (G. ii. 103).

[4] Of course in the (unusual) case of an oral will this was omitted.

the tablets having been prepared, the testator, A, must get together five Roman citizens above puberty as witnesses, a *libripens*, and some friend, C, to act as *familiae emptor*. A then, *pro forma*,[1] sells (or mancipates) his estate (*familia*[2]) to C, the *familiae emptor*. C, holding a piece of bronze in his hand, says to A, in effect, 'Let your *familia* and *pecunia* be mine (but only as a guardian and custodian) by purchase with this piece of bronze and these bronze scales,[3] so that you may lawfully be able to make your will according to the statute'.[4] C then strikes the scales with the bronze which, as forming the nominal purchase money,[5] he hands to A, and the *mancipatio familiae*—the fictitious sale of A's estate—is at an end. All that remains is the *nuncupatio*, *i.e.* the public declaration of the purposes for which C holds the property as custodian. A, therefore, holding the tablets upon which the will is written in his hand, declares, 'According as it is written in these tablets, so do I give and bequeath, and so do you, Quirites, bear witness'.[6] The business is then at an end, C is never heard of again; when A dies the will, unless he has duly revoked it or altered it (in which case the whole proceedings must be gone through again), will be produced and opened, and the heir who is found to be named in it will become A's legal heir. Mr. Roby sums up the proceedings in a very happy expression. 'In short

[1] *Dicis gratia.* [2] *Familia, id est patrimonium.*

[3] *I.e.* the scales held by the *libripens*.

[4] See for the exact words G. ii. 104. The statute referred to is the XII Tables, and the particular provision probably is *Cum nexum faciet mancipiumque uti lingua nuncupassit, ita jus esto.* The testator has just made a *mancipium* or mancipation, its effect will be according to the nuncupation he is about to make, viz. the publication of his will.

[5] *Est enim mancipatio . . . imaginaria quaedam venditio* (G. i. 119).

[6] G. ii. 104.

(to employ the terms of English law), the mancipation is a formal conveyance of the whole estate of the testator to the uses (or purposes) of his will, and the nuncupation is the declaration of uses.'[1] It is to be noted here that the formula employed differs in important particulars from that of the ordinary *mancipatio*: there is no assertion, 'I say this thing is mine in quiritary right', for it is natural that in such a case no warranty should be required. Again the assertion is not of ownership but, so to speak, of trusteeship with respect to the *familia*. The statute referred to may be the XII Tables, for it was probably by a construction of certain clauses of this enactment that the power of testation was achieved. Maine holds that the plebeian mancipatory will required sanction on account of the posthumous effect of the mancipation, and that this was given by the XII Tables in the text still extant: *Pater familias uti de pecunia tutelave rei suae legassit, ita jus esto.*[2]

The so-called Praetorian will.—Two facts strike one about the will *per aes et libram*. First, the form is extremely technical and cumbrous. Every system of law requires a will to be executed with some sort of formality as a proof, not merely that the testator is serious, but that the document really is his will, and this is the essence of the transaction. But any reasonable man would be satisfied in these particulars by a form involving far less detail than that required in the classical law; there can be little doubt, *e.g.*, that a will is a real signification of serious intention if it satisfies the simple requirements of English law.

[1] Roby, i. 178. Cf. feoffment to the uses of the will before the Statute of Uses.

[2] See, too, Girard, p. 853 *sqq.*

Secondly, in spite of the many formalities involved in the will *per aes et libram*, there was nothing to identify the will, when ultimately produced, with the tablets which the testator had held at the sale, for a brief moment, in his hand. To meet this second objection the practice seems to have grown up for the five witnesses, the *libripens*, and the *familiae emptor* (*i.e.* seven persons altogether) to seal up the will with their seals, which, of course, identified the document beyond doubt. The first objection (the unnecessary formalities) was, after a time, met by the praetor, who seems to have realised that the vital thing was that the will should be duly witnessed, and that the rest of the proceedings were really superfluous. The praetor, accordingly, if a will could be produced sealed with the seals of seven witnesses, granted *bonorum possessio* (*i.e.* the beneficial enjoyment of the property) to the person named in the will (*secundum tabulas*). The praetor could not declare such person *heres*, *nam praetor heredem facere non potest*, but he did the next best thing by giving him the property and protecting him in the possession of it; and accordingly, although the mancipation had been defective or absent altogether, the praetor granted *bonorum possessio* to the person named *heres* in a properly sealed will. At first, however, this only amounted to *complete* and *final* possession where the mancipation was in due form, and the heir, therefore, *heres jure civili*;[1] for, originally, this grant of *bonorum possessio* was *juris civilis adjuvandi gratia* merely, *i.e.* an additional remedy given by the praetor to the civil law *heres*; and being only *adjuvandi gratia*, if

[1] Or, of course, where the intestate heir did not choose to eject the *bonorum possessor*, *e.g.* because the *hereditas* was *damnosa*.

the mancipation had been absent or defective the testamentary heir who applied for and obtained *bonorum possessio* (because there was a duly sealed will) had no answer to the intestate heir who treated the will as invalid at law (as it was), and brought an action (*hereditatis petitio*) against the *bonorum possessor* claiming the estate. Antoninus Pius, however, altered the law and made *bonorum possessio secundum tabulas juris civilis corrigendi gratia*; if, after his rescript, a properly sealed will could be produced appointing B *heres*, B could not be deprived of the *bonorum possessio* he had obtained from the praetor by A, the intestate heir, even though there had been no mancipation. B therefore had all the practical advantages of heirship (in spite of the fact that, the will being invalid at *jus civile*, A was the legal heir); for B could defeat A's *petitio hereditatis* by the plea of fraud (*exceptio doli*).[1]

In the time of Gaius, therefore, the civil law will was the will *per aes et libram*, and this was the only method of constituting a *heres jure civili*; but a written will sealed with the seals of seven witnesses, though the heir therein named only became *bonorum possessor*, was valid by praetorian practice confirmed by the Emperor, and possession under it, being abundantly protected by interdict and otherwise, was good for all purposes.

Wills under Justinian.—In the time of Justinian the will *per aes et libram* had been superseded by the

[1] *Bonorum possessio secundum tabulas* being granted when some formality had been omitted, *e.g.* if a woman of full age under *tutela* made a will without her tutor's *auctoritas*, instituting X *heres* and X got *bonorum possessio*. It would appear, after Pius, to have been final and not merely provisional, unless the tutor whose authority had not been obtained were the woman's parent or patron (G. ii. 121-122).

testamentum tripertitum. It was called *tripertitum* because the provisions regulating it were derived from three sources. The will had to be made at one and the same time as a single act (*uno contextu*), in the presence of seven witnesses (a provision surviving from the *jus civile*), sealed with their seven seals (from the *jus honorarium* of the praetor), and signed with their seven signatures[1] (as provided by an Imperial constitution, viz. of Theodosius II., A.D. 439). This was the ordinary form of will under Justinian, but there were besides other forms of little importance.

A. (ii.) *Codicilli.*[2]

A codicil in England is a supplement to a will, made after its execution, and itself executed in the same way as the will. At Rome *codicilli* had no necessary connection with a testament; they were small tablets used for writing memoranda or letters. Justinian tells us that Lucius Lentulus, when dying in Africa, wrote *codicilli* (which were confirmed by his will), in which he requested Augustus to perform something by way of trust (*fideicommissum*) for him. Augustus seems to have doubted whether this was legal (as a will ought to be made 'at one and the same time'), and he consulted Trebatius on the point. Trebatius, on the ground of convenience, advised the Emperor to admit the codicils, and Augustus performed the trust, as did others upon whom trusts had been imposed by Lentulus, and his daughter paid some legacies which she was not legally bound to pay. *Codicilli* having thus obtained recognition continued in force down to and in Justinian's time. At first no particular form was required, but by the time of Theodosius II. all codicils were required to be wit-

[1] *Subscriptiones.* [2] G. ii. 270 *a*, 273; J. ii. 25.

nessed as wills (by seven witnesses, though Justinian reduced the number to five). Justinian also provided that if a codicil had been made with no formality, the person in whose favour it was made might sue, but would fail if the heir denied the fact on oath. A codicil might be annexed to a will[1] (*codicilli testamentarii*), and either confirmed by it (*codicilli confirmati*) or not (*codicilli non confirmati*); or it might be independent of any will (*codicilli ab intestato*). Accordingly, a practice arose of adding a *clausula codicillaris* to wills, by which the testator declared that if his will failed to take effect, it was to be construed as a series of bequests made by *codicilli*. At no period was it possible, however, to accomplish everything by means of *codicilli* which could be done by a will. In the time of Gaius their chief use was to impose *fideicommissa*; and Gaius tells us that though a *fideicommissum* might be imposed by an unconfirmed codicil, a legacy bequeathed by codicil was invalid unless confirmed, *i.e.* unless the testator in his will had expressly declared that effect should be given to any gift made by him by any codicil,[2] and Gaius further states that no one could be instituted heir, or disinherited even by a confirmed codicil, though the same effect as institution could be produced by requiring in a codicil the heir instituted by will to hand over the *hereditas* or part of it by way of *fideicommissum*.[3] In Justinian's time the distinction between confirmed and unconfirmed codicils was of little practical importance, because of his assimilation of legacies and *fideicommissa*, but he tells us that

[1] In which case its fate usually depended on the fate of the will; *i.e.* if the will were for any reason invalid the codicil failed too.

[2] G. ii. 270 *a*.

[3] G. ii. 273.

where codicils are made before the will they only take effect if specially confirmed by the will, adding, however, that Severus and Caracalla had decided that persons to whom things were given by way of *fideicommissa* by a codicil made before a will might take them if it appeared that the donor had not abandoned his intention in their favour. Justinian confirms the statement made by Gaius with regard to the institution of heir [1] and adds that a condition cannot by a codicil be put upon the testamentary heir, nor can a direct substitution be made.

Specially Privileged Wills

Soldiers enjoyed special privileges with regard to will-making from the time of Julius Caesar onwards. On account of their inexperience (*propter nimiam imperitiam*) they were allowed, while on active service (J. ii. 11. *pr.*), to make a valid will without any formality ; if the will were written, no witnesses were required ; and even in the case of an oral will the usual number were unnecessary, one or two to prove what the soldier said, and that he spoke seriously,[2] were sufficient. Such a will in Justinian's time remained valid for a year after his discharge, even though the heir was instituted on a condition which was not fulfilled until after the year. If, however, the soldier were discharged in disgrace within the year, the will failed. A soldier's will was also privileged in that it could be made even by a deaf and dumb person, and might only dispose of part of his property, for the

[1] J. ii. 25. 2.

[2] *I.e.* not lightly or jestingly in the course of conversation (J. ii. 11. 1).

rule *nemo pro parte testatus, pro parte intestatus decedere potest* did not apply ; further, the *hereditas* might be exhausted by legacies or *fideicommissa*, for the *lex Falcidia* and the *S.C. Pegasianum* had also no application. *Peregrini* and *Latini Juniani* could be made heirs or legatees, but not *incertae personae*.[1] It was unnecessary for a soldier to disinherit his children, for his silence was a tacit disinherison, unless it was because he was ignorant that he had children.[2] Finally, a soldier's will remained valid in spite of his undergoing *capitis deminutio*.[3]

Other examples of specially favoured wills in Justinian's time were—

(i.) *Testamentum parentis inter liberos* ; *i.e.* if a man bequeathed his estate solely to his own issue, his will was valid without any witnesses.

(ii.) *Testamentum tempore pestis* ; where the testator was suffering from a contagious disease, the witnesses need not be actually present.

(iii.) *Testamentum ruri conditum* ; for a will made in the country five witnesses were enough (instead of the normal seven), and if some of the witnesses could not write, their signatures were dispensed with.

B. *The contents of the will and rules thereto relating.*

There were certain general principles underlying the making of wills which need to be considered here. (1) *Institutio heredis*, the appointment of an heir, was the primary, and perhaps, at first, the only purpose of the will. In classical law it had to come first, except for the appointment of tutors and disherisons :

[1] J. ii. 20. 25. [2] J. ii. 13. 6.

[3] The *peculium castrense* is another instance of special favour to soldiers : if a *filiusfamilias* disposed of this by will on active service, the will might be informal ; if not made on service, it had to be made in accordance with the ordinary forms.

caput et fundamentum intelligitur totius testamenti heredis institutio. (2) As the succession was *per universitatem*, the heir or heirs had to be appointed to the whole of the estate, for *nemo pro parte testatus pro parte intestatus decedere potest* (no one can die partly testate and partly intestate). (3) The rule *semel heres semper heres* (once heir always heir) prevented the institution of an heir for a certain time or from a certain time. Minor rules concerning the institution of the *heres* will be dealt with under that head. Of more particular rules let us consider :

1. Rules for the protection of the family—

(*a*) *Exheredatio.*
(*b*) *Querela inofficiosi testamenti.*

(*a*) *Exheredatio.*—On the death of a person intestate those persons (called *sui heredes*) succeeded to him who were in his power at his death, and who by his death became *sui juris*. But traces of the old conception, that the property belonged to the family and not to the *paterfamilias*, remained even in the developed law, and Gaius tells us that *sui heredes* were regarded, even in their parent's lifetime, as in a sense owners of the family property (*sed sui quidem heredes ideo appellantur quia domestici heredes sunt et vivo quoque parente quodammodo domini existimantur*[1]). This conception gave rise to the rule that it was the duty of a testator either expressly to institute as his heirs, or expressly to disinherit those persons who but for the will would have taken the property. If not so disinherited they were known as *praeteriti*, and the whole will might fall to the ground ; in which case, of course, the property devolved as on an intestacy. A

[1] G. ii. 157.

woman, however, was not obliged to disinherit, because she could have no *sui heredes*. According to the ancient *jus civile*, if a son in *potestas* was not instituted *heres* it was necessary to disinherit him by name,[1] and failure to comply with this rule made the whole will void.[2] If a *suus omissus* died before the testator the Proculians held that the will was saved, but the Sabinian view that it was void prevailed. Other *sui heredes* (*e.g.* a daughter or grandson, the father being dead or disqualified, *e.g.* by emancipation) had also to be disinherited; but a general clause (*inter ceteros*) was enough, *e.g.*, *Ceteri omnes exheredes sunto*. And failure to disinherit them had not the same consequence as with a son; the will was good,[3] but the *praeteriti* came in with the heirs instituted in the will and shared with them by 'accretion'; if the instituted *heres* was a *suus* the *praeteriti* shared with him equally,[4] if a stranger (*extraneus*) the *praeteriti* took half the inheritance. If there were both instituted *sui* and *extranei*, the *praeteriti* (or *praeteritae*) shared equally with the *sui* and took half as against the *extranei*. For example:

(i.) Titius has three sons and a daughter, Julia. By his will he institutes his three sons heirs and fails to disinherit Julia. Julia takes an equal share (*pars virilis*) by accretion, and so gets exactly what she would have obtained on an intestacy, viz. one-fourth part of the estate.

(ii.) Titius has no *sui heredes* save one daughter,

[1] *Nominatim*, but his actual name need not be mentioned if the intention was clear, *e.g. filius meus exheres esto*, the testator having only one son (cf. G. ii. 127).

[2] *Inutiliter testabitur* (G. ii. 123).

[3] *Ceteras vero liberorum personas si praeterierit testator valet testamentum* (G. ii. 124).

[4] Called technically *in virilem partem* (G. ii. 124).

Julia. By his will he institutes a stranger (*extraneus*), Balbus, heir and fails to disinherit Julia. Balbus and Julia each take half the inheritance, and Julia would have taken half even though two or more *extranei* had been instituted.

(iii.) In (i.) if Titius instituted his three sons and an *extraneus* each to one-quarter, and omitted Julia, Julia shared equally with her brothers, taking one-quarter of three-quarters and, in addition, one-half of the quarter share given to the *extraneus*, or five-sixteenths in all, a rather surprising and certainly unfair result.

The praetor amended the law; he required all male descendants in power (*e.g.* a grandson not less than a son), if not instituted, to be disinherited by name, though females could still be disinherited by an *inter ceteros* clause.[1] If these requirements were not fulfilled the praetor did not upset the will, but granted *bonorum possessio contra tabulas* to the *praeteriti*; if the *institutus* were a *suus heres* the *praeteriti*, by *bonorum possessio*, shared equally with him as on an intestacy; if, however, the person instituted were an *extraneus*, the praetor went further than the civil law, he granted the *praeteriti bonorum possessio*, not merely, as at *jus civile*, of half the estate, but of the *whole*, so that the *extraneus* got nothing; he remained legally and technically *heres*,[2] but his heirship was worthless (*qua ratione extranei heredes a tota hereditate repelluntur et efficiuntur sine re heredes*).[3] Antoninus Pius (or Caracalla), however, amended the law; if the persons who were not disinherited were

[1] G. ii. 129.

[2] Unless the *praeteritus* was a *filius*, in which case the will was, as above stated, invalid altogether by the civil law rules.

[3] G. ii. 125.

females (*suae praeteritae*) they were only to get by *bonorum possessio* what they would have taken at *jus civile*, *i.e.* half, instead of the whole of the estate.

Emancipated liberi.—According to the civil law it was unnecessary to disinherit a person who would not have been a *suus heres* of the testator because he had been emancipated; *e.g.* A has two sons, X and Y, he emancipates X in his lifetime: on A's death Y is his sole heir. X is not *suus heres*, because he did not become *sui juris* on his father's death (as *sui heredes* must), but earlier, viz. on emancipation; it is unnecessary, therefore, either to institute or to disinherit him. The praetor, however, altered the law by providing that such persons must be either instituted or disinherited—males by name, females *inter ceteros*.

Adoptivi, so long as in the *potestas* of the adopter, were in the same position as natural children, and therefore had to be instituted or disinherited according to the rules of the civil law. Conversely, to their real father they were regarded as strangers so long as they were members of their new family, and disinherison was unnecessary. If an adoptive child were emancipated by his adoptive father the child had no claim, either by *jus civile* or *jus honorarium*, in regard to his adopter's estate, and originally no claim in regard to his real father's estate; but the praetor amended the law and gave him *bonorum possessio* to his natural father, unless such father had disinherited him.[1]

Postumi[2] are persons who, though not heirs at the date of the will, become so afterwards. Such *postumi* are of two main kinds:

[1] G. ii. 136-137.

[2] The student is advised, at a first reading, not to attempt to master the details of the various kinds of *postumi*.

(i.) *Postumi* in the strict sense, *i.e.* sons and daughters of the testator who become his *sui* by being born to him after the date of the will.

(ii.) Persons *postumorum loco, e.g.*—

(*a*) Persons brought under *potestas* by marriage *in manum*, adoption, adrogation, or by being made legitimate.

(*b*) Descendants who become *postumorum loco* by *quasi-agnation*;[1] *e.g.* A has a son B, and C, a grandson by B, in his *potestas*. B is A's *suus heres* to the exclusion of C, but if B ceases to be in A's power during A's lifetime (*e.g.* dies or is emancipated), C will by quasi-agnation succeed to his father's place and become A's heir. C, therefore, is said to be *postumi loco*.

The ancient civil law in its requirements with regard to *praeteritio* made no distinction between persons already *sui* and persons who might become so (*postumi*), but a *postumus* being necessarily an *incerta persona*, was originally incapable of being instituted or disinherited. Nevertheless, although a testator was, in the nature of things, unable to comply with the rule *postumi quoque liberi institui debent vel exheredari*, the fact that a person became his *postumus suus* after the date of the will totally invalidated the will. Very soon, however, it came to be possible, even according to *jus civile*, to institute or disinherit (although *incertae personae*) all the possible classes of *postumi* who were descendants of the testator. There remained persons *postumorum loco* by marriage *in manum*, by adoption, adrogation, and by being made legitimate. Marriage *in manum* was practically obsolete in the time of Gaius, but in

[1] G. ii. 133.

the other three cases it would seem that even in Justinian's time such persons could not be disinherited, as a general rule, by anticipation, and that therefore when a person acquired a new *suus heres* in this way his will became invalid.[1] With regard to a *postumus alienus*, *i.e.* an afterborn child of some third person, the civil law rule was that such person (being as much an *incerta persona* as a *postumus suus*) could not be instituted,[2] but the praetor granted such a person, if instituted, *bonorum possessio*, and Justinian provided that he might even be made legal heir.[3]

So far as it was possible to disinherit *postumi* the rule was that male *postumi* had to be disinherited *nominatim*,[4] *i.e.* by a sufficient description, females *inter ceteros* ; but if the clause were quite general, *e.g.* *ceteri exheredes sunto*, *i.e.* with no mention of *postumi*, it was not a good disinherison unless, in the case of a daughter or grandson, the testator gave legacies to them, so as to show that in framing the general clause he had them in mind.

Justinian tells us in his *Institutes* that he made certain changes in the law of *praeteritio* :

(i.) He abolished the distinction between males being disinherited *nominatim* and females *inter ceteros*, all descendants who might succeed had to be disinherited *nominatim* ; otherwise, if the *praeteritus* was a *suus heres* (whether male or female) the will was void ; if the *praeteritus* had been emancipated the will was not upset, but the *praeteritus* got *bonorum possessio contra tabulas*.

[1] G. ii. 138 *et seq.* ; J. xvii. 1.

[2] G. ii. 242.

[3] J. iii. 9. *pr.* (*recte heres instituitur*).

[4] Of course this cannot mean by name ; it was a sufficient disinherison *nominatim* to say *Quicumque mihi filius genitus fuerit, exheres esto* (G. ii. 132).

(ii.) A child, even though given in *adoptio* (unless the *adoptio* were *plena*), had to be instituted or disinherited by his natural father.

Justinian's wider changes, by means of the 115th Novel, will be noticed in connection with the next topic dealt with.

(*b*) *The querela inofficiosi testamenti.*[1]

As a protection to the heirs the principle of *praeteritio*, involved as it was, was imperfect. It had, as has been stated, no application to a woman's will, and even in the case of a man's testament, his heirs, provided he took care to disinherit them properly, whether under the rules of civil or praetorian law, had no legal ground of complaint. Soon after the time of Cicero, however, a new remedy was devised, based less upon the ancient idea of family ownership than upon the more modern conception, that a testator is under a duty to provide after his death for those related to him by near kinship.[2] This remedy received the name *querela inofficiosi testamenti*, 'the plaint of an unduteous will', the will being attacked on the supposition that a testator who, without any ground, failed to provide for his relatives must be presumed to be more or less insane, and his will, accordingly, invalid (*quasi non sanae mentis*).[3] The *querela* was brought before the *Centumviri*, and was open to those persons, whether disinherited in the will or simply omitted in the case of a

[1] J. ii. 18. The *querela* is not dealt with by Gaius, though it certainly existed in his time.

[2] Which is, however, unrecognised by modern English law, which permits a testator to 'endow a college or a cat,' and to throw his wife and children destitute upon the world.

[3] Of course, if the testator were actually mad, *furiosus*, his will was *void ab initio*.

woman's will, who, had the testator died intestate, would have been his nearest heirs; *e.g.* to children[1] against the will of their father or mother, parents against the will of their children, and to a brother or sister, but, in this case, only if the person instituted heir were *turpis* (a base or disreputable person). The following conditions had to be satisfied :

(1) There must be an heir against whom the action is brought, so that the *querela* does not lie until *aditio*.

(2) The claimant must show that under the will he fails to obtain one-fourth part of the share to which he would be entitled on an intestacy.

(3) That he cannot get his rights in any other way ; if, for example, being *praeteritus* he could get *bonorum possessio* from the praetor, the *querela* is not available, since it involves an imputation on the testator's sanity, and so is not lightly to be issued.

(4) That he has not deserved to be disinherited or omitted ; a claimant, therefore, would be defeated if the instituted heir proved, *e.g.*, that the disinherison was due to gross ingratitude towards the testator.

(5) That he has not acquiesced in the testator's decision, *e.g.* by accepting a legacy.[2]

(6) Not more than five years must have elapsed since the death of the testator.

The effect of the *querela*, if successful, was, in the ordinary case, to upset the will altogether ; when, of course, the claimant got his share as on an intestacy. But it might, exceptionally, produce only a partial intestacy, contrary to the rule *nemo pro parte testatus*;

[1] Including *postumi* and *adoptivi* (where the *adoptio* was *plena*).

[2] But where a tutor's father by his will gives the ward a legacy and omits the tutor, the latter's right to the *querela* is not barred by accepting the legacy in the name of the ward (J. ii. 18. 4).

e.g., where there were several heirs, and the *querela* was only brought against one, or where there was a compromise. If the claimant fails, any benefit given him by the will lapses to the *fiscus*, but if a tutor brings the *querela* in his ward's name (because the ward's father left his son nothing), and fails, the tutor will not forfeit any legacy given to himself by the will.[1]

Some time before Theodosius II. the rule was introduced that, if there was a direction in the will to make up the requisite legal portion, the *querela* was excluded, the claimant's remedy being an action *ad supplendam legitimam*.

Justinian altered the law, for, as he tells us in his *Institutes*,[2] he provided that the *querela* should only be brought where the claimant had received nothing at all under the will. If the claimant had obtained under it anything, however small, he could only bring an *actio ad supplendam legitimam* against the heir, which did not upset the will, but enabled the claimant to get what was left to him made up to one-fourth of the share which he would have taken on an intestacy. Next, by his 18th Novel, Justinian enacted that a testator with four children or less must leave them equally at least one-third of his estate; if he had more than four, at least a half. Finally, by his 115th Novel, Justinian provided that an ascendant was bound to institute as heirs those descendants who would have taken on an intestacy, and *vice versa*, unless one of the definite legal grounds (which he specified) to justify the disherison was stated in the will, and could be proved. If a testator failed without due cause to institute a person who had a claim to be instituted under the above provision, the actual

[1] J. ii. 18. 5. [2] J. ii. 18. 3.

institution was void and the *praeteritus* became heir as on an intestacy; the will, however, was not wholly avoided, but only to the extent of the institution, *e.g.* legacies, *fideicommissa*, and appointments of guardians (*supra*) remained valid. If, on the other hand, the testator had instituted a person whom he was bound to institute heir, but had given him less than his lawful share in the estate, the will, in this case also, remained valid, but the claimant had an *actio* against the heir *ad supplendam legitimam*. The rights of brothers and sisters, however, were not altered by this Novel. If the share they obtained under the will were less than their lawful share, they could bring the *actio ad supplendam legitimam*; if they received nothing and the instituted heir were *turpis*, they could bring the *querela inofficiosi testamenti* for their intestate portion. As between ascendants and descendants, however, the *querela*, after this Novel, became unnecessary, and as regards all heirs, the importance of *praeteritio* was considerably modified, since it was of no avail to disinherit the *heres* unless a statutory ground could be adduced for it.

2. Heirs and their institution.

(*a*) *Classes of heirs.*

There were at Rome three possible classes of heirs under a will: (i.) *necessarii*, (ii.) *sui et necessarii*, and (iii.) *extranei*.

(i.) A *necessarius heres* was a slave of the testator whom he appointed heir, at the same time giving him his freedom.[1] The usual object was, of course, that if the estate were insolvent it might be taken in execution as the slave's, and not in the name of the

[1] In Justinian's time, as already stated, the mere institution as *heres* carried freedom with it by implication.

testator, and so the disgrace attaching to insolvency would be avoided. A slave appointed heir was called *necessarius* because he had no option. Only one could be so appointed, and this notwithstanding the *lex Aelia Sentia*. He therefore became heir without any formal act from the moment of the testator's death, continuing the testator's legal personality; so that, according to the civil law, he must satisfy the testator's debts, if necessary, out of his own *peculium* and his future acquisitions. The praetor, however, allowed him the *beneficium separationis*; *i.e.* he might keep all property made by his own exertions[1] since the death of the testator.

(ii.) A *suus et necessarius heres* was a person who was in the *potestas*[2] of the testator at his death, and who by his death became *sui juris*. Such person was *suus*, because a family (*domesticus*) heir; *necessarius*, because he too, like a slave, had no option; he became heir, without any need for assent, from the moment of the death, and so liable for his ancestor's debts out of his own property. But these heirs came also to be protected by the praetor, viz. by the *jus* or *beneficium abstinendi*. Provided they took care not to act as heir in any kind of way,[3] then, whether they formally demanded the privilege or not, their own property could not be made liable for their ancestor's debts.

(iii.) An *extraneus heres* is any person other than the above with whom the testator has *testamentifactio*

[1] But he could not keep acquisitions obtained in right of his late master; *e.g.* if, as representing the testator, he succeeds to the property of one of his late master's freedmen, it can be sold to satisfy the creditors (cf. G. ii. 155).

[2] Not, of course, *dominica potestas*.

[3] But if a minor, even acting as heir did not matter.

(*infra*). Since a mother did not enjoy *patria potestas*, and, therefore, had no *sui heredes*, her own children appointed heirs by her will were *extranei*. An *extraneus heres*, however, was not at once heir upon the testator's death (as was the case with a slave or a *suus heres*); he had in some way to show that he accepted the position (acceptance being technically known as *aditio*), and until he accepted the *hereditas* was known as *hereditas jacens*, and could, in some cases, acquire rights or become subject to obligations (*e.g. fructus naturales*, or through the *peculium* of slaves, or their verbal contracts; or by reason of wrongs done to them); for these the heir could sue after acceptance.[1] Ulpian tells us that *hereditas jacens non heredis personam, sed defuncti sustinet*; Pomponius that it sustained the *persona* (legal personality) of the heir. These apparently contradictory statements may, perhaps, be reconciled on the theory that, until the heir accepts, the *hereditas* sustains the *persona* of the testator, but that once the heir enters, all the rights and liabilities which have accrued to the *hereditas* between death and entry pass to the heir, whose acceptance may therefore be looked upon as retrospective; and in this sense it is true that the *hereditas* does, after entry, sustain the heir's *persona*, whereas before entry it sustained the testator's.[2]

Since, until the heir accepted (made *aditio*), there was no person who could legally be answerable to creditors and to legatees, or perform the *sacra*, the practice arose, Gaius tells us, for the testator in appointing an *extraneus heres* to limit the time within which he might make up his mind. The clause in

[1] Until the heir made *aditio* the *hereditas* was said to be *delata* to him.

[2] Cf. Sohm, pp. 512-515.

question was called *cretio*, from *cernere* or *decernere*, 'to come to a decision', and ran as follows: 'Let Titius be *heres* and accept within 100 days, otherwise let Titius be disinherited and let Maevius be *heres*'. This kind of *cretio* was called *continua* or *certorum dierum*, and time began to run immediately from the testator's death; the more common form, however, was the *cretio vulgaris*, in which, after the words '100 days', were added '*quibus sciet poteritque*', so that time did not necessarily run from the testator's death, but from the time when Titius first knew that he had been made heir and was in a position to accept. Whatever the form of the *cretio*, Titius had within the time specified solemnly to signify acceptance in these words: 'Balbus having instituted me heir by his will I enter upon and accept the inheritance'. If he failed to do this the clause operated automatically to disinherit him at the end of the period. But as during the period nothing short of a formal acceptance made him heir, so an informal renunciation did not bind him; he was free to make a proper acceptance on the very last day, although in the *interim* he formed the intention of disclaiming.[1] Where the testator omitted to insert a *cretio*, the heir might make *aditio* either by acting as heir (*pro herede gestio*), or by a declaration of acceptance, though informally made;[2] and he might informally decline, but he was not bound to make up his mind within any definite period. Accordingly, the custom arose for the praetor, on the application of the creditors of the estate, to fix a time (*tempus ad deliberandum*) within which the heir must decide, and the praetor would even 'cut down' the time specified in the *cretio* if he considered it too

[1] G. ii. 168.

[2] *I.e.* in the time of Gaius.

long. If the heir failed to accept within the limit so set, the praetor might allow the creditors to sell the estate. The fixing of a time by the praetor being obviously more simple than the formal *cretiones*, the latter seem to have fallen into disuse after Gaius, and were abolished by Arcadius and Theodosius. In the time of Justinian, therefore, an *extraneus heres* (as other heirs) was appointed without any *cretio*, and might accept or repudiate the inheritance by any sufficient declaration of intention, though made informally ; he might accept, *e.g.*, by *pro herede gestio*, *i.e.* doing any act in relation to the *hereditas*, which could only be done legally in his capacity as *heres*. If he delayed to enter, not more than nine months[1] were allowed him ; if he did nothing in that time he forfeited his right to accept.

Justinian, however, made a still more important reform in the introduction of the *beneficium inventarii*. Hitherto, upon the principle *semel heres semper heres*, the heir once constituted was identified with his testator or ancestor ; *confusio* of the property of the deceased and the heir took place, so that not only did the *hereditas* become answerable for the obligations of the heir, the heir was for ever liable for the obligations of the deceased, as has been said, out of his own pocket.[2] Even before Justinian, however, the strictness of the civil law rule had been relaxed. If the creditors of the *hereditas* feared that the heir's personal debts (being greater than his assets) might exhaust the deceased's estate, the praetor allowed such creditors to apply for *separatio bonorum*, *i.e.* to

[1] Or, by special permission of the Emperor, a year.

[2] A *hereditas* where the liabilities exceeded the value of the assets was known as *damnosa*.

have the two estates, the ancestor's and the heir's, strictly kept apart, provided—(α) the application were made within five years; (β) that separation were still possible; and (γ) that the creditors had not treated the heir as their debtor. If the *separatio* were granted the creditors had the right to pay themselves out of the *hereditas* in priority to any claims on the part of the creditors of the heir. There was some doubt whether the creditors of the *hereditas*, if they took this course, and the estate proved insufficient, could still claim the balance from the heir. Papinian thought they might be admitted to sue him after his own creditors had been satisfied out of his property, but Ulpian and Paul held that by obtaining *separatio bonorum* the creditors lost all right against the heir. Conversely, the strictness of the civil law rule was soon modified in favour of the heir by means of the analogous *separatio bonorum* granted to the slave who became *necessarius heres*, and the *jus abstinendi* accorded to the *suus*, while the *extraneus* always had the right to decline. Nevertheless, before Justinian's change, the rule *semel heres, semper heres* might operate harshly. Once a *suus* of full age, for example, intermeddled with the estate, and the moment the *extraneus* accepted, they became heirs and answerable absolutely, the only possible cases of revocation being—(α) where the praetor set the acceptance aside on the ground that it had been made by an *adolescens*, *i.e.* a person under twenty-five years; (β) where the person accepting was a soldier (but only after the time of the Emperor Gordian, who introduced the privilege).[1] In all other cases, after

[1] Justinian, in the same passage (ii. 19. 6), says that Hadrian once allowed revocation by a person over twenty-five years, when it turned

acceptance, the heir was personally liable, and might, if the estate proved insolvent, be reduced to absolute ruin.

Justinian, accordingly, remedied the hardship and applied the principle underlying the praetorian grant of *separatio bonorum* to creditors, in favour of the heir. He enacted that the liability of the *heres* (of whatever kind he might be, and whether testamentary or intestate) should be confined to the assets of the deceased, provided—(i.) that he did not ask for a *spatium deliberandi*; (ii.) that he made an inventory of the deceased's estate and effects; this inventory had to be taken in the presence of witnesses, and begun within a month and finished within three months from the time the heir first knew that he had become so. If, instead of making an inventory at once, the heir asked for a *spatium deliberandi*, the position was as under the old law, but if the heir ultimately accepted the *hereditas* and failed to make an inventory, he forfeited his right to the *quarta Falcidia* (*infra*), and was bound, therefore, to discharge all bequests made by the testator in full.

(*b*) *The institution of heirs.*

The institution of an heir or heirs, Gaius tells us, is the foundation of the entire will (*caput et fundamentum totius testamenti*);[1] and, therefore, according to the civil law, such institution must precede all other dispositions made by the will except disinherisons, and, according to the Proculian view, the appointment of tutors. Therefore, Gaius says, before an heir is instituted it is useless to give legacies, or to

out that the estate was subject to an unknown debt of great amount, but he makes it clear that this was not a law but a special *privilegium* to the individual in question.

[1] G. ii. 229.

make a bequest of freedom, or, according to the Sabinians, even to appoint a tutor.[1] Justinian, however, considered that it was unjust that the mere order of words should operate to defeat the intention of the testator, and allowed all these three things to be validly done before the heir was instituted.[2] Further, the institution of the heir originally had to be made in a formal manner (*solemni more*).[3] Instances of an *institutio solemnis* are, *Titius heres esto*, or *Titium heredem esse jubeo* ; on the other hand, *Titium heredem esse volo* was not orthodox, nor, according to most lawyers, was *Titium heredem instituo* or *heredem facio*. The law on this point was altered in A.D. 339 by Constantine II., who enacted that a *solemnis institutio* was unnecessary, provided the intention of the testator to make the person in question heir was clear, however informally it might be expressed.

A testator might institute one heir or several, and, if several, their shares were presumed to be equal, but the testator could make them unequal (*e.g.* A one-fourth, B three-fourths) by showing that such was his intention. If he only instituted one heir and gave him merely a share of the *hereditas*, such heir took the whole ; for a citizen had to die either with a will or without one ; the devolution of his property after his death could not be governed partly by the law of testate, partly by the law of intestate succession : *neque enim idem ex parte testatus et ex parte intestatus decedere potest*.[4] The Roman practice was to regard the whole *hereditas* as an *as*, divided into 12

[1] G. ii. 229, 230, 231. [2] J. i. 14. 3 ; ii. 20. 34.

[3] G. ii. 116.

[4] But this rule was often infringed by the rules of positive law, *e.g.* by *bonorum possessio contra tabulas*, sometimes by the *querela inofficiosi testamenti*, and by Justinian's 115th Novel.

unciae. A sole heir was *heres ex asse*, an heir to a half *heres ex semisse*, and so on. If the testator gave in shares more than 12 *unciae* the *as* was regarded as made up, not of 12 *unciae*, but of the number of *unciae* specified. If he gave in shares less than 12 *unciae*, the rule was the same. If several heirs were instituted, the shares of some being specified, and of another or others unspecified, then—

(*α*) If the specified shares did not exhaust the *as*, the heir or heirs whose shares were not specified took what was left, if more than one, equally.

(*β*) If the specified shares exactly amounted to the whole *as*, each set of heirs took half the inheritance between them.

(*γ*) If the specified shares exceeded the *as*, the *as* was considered as consisting of 24 or, if necessary, 36 *unciae*, and the heirs whose shares were unspecified took the difference; *e.g.* between 13 and 24, or 25 and 36, as the case might be.

Owing to the maxim *semel heres semper heres*, an heir could not be appointed *ex certo tempore* (*e.g.* 'let Titius become my heir five years after my death') or *ad certum tempus* (*e.g.* 'let Titius be my heir until the Ides of March next after my death'). In such a case the clause was treated as redundant (*pro non scripto*). Justinian tells us, however, that an heir might be appointed subject to a condition (*heres et pure et sub condicione institui potest*),[1] but this needs some qualification. (i.) If the condition were impossible, illegal, or immoral, it was taken *pro non scripto*. (ii.) If the instituted heir were a *filius* of the testator, and the condition one which he could not fulfil, the will was void, because the *filius* was, in effect,

[1] J. ii. 14. 9.

praeteritus. (iii.) A condition subsequent, *i.e.* one which, in a given event, took the *hereditas* away from the heir, was taken *pro non scripto*, for the same reason as a clause *ad certum tempus*. (iv.) A condition precedent was good (*e.g.* 'let Titius be my heir on condition that he marries Julia'), but the heir did not in strict law become so until the condition was fulfilled. The praetor, however, in such a case, where it was in the power of the heir to fulfil, granted *bonorum possessio secundum tabulas* to the heir on his undertaking (by a *cautio*) to restore the *hereditas* if he failed to satisfy the condition; but in other cases the condition had first to be satisfied before the heir could enter; and, in the case of a negative condition which could not be fulfilled until death (*e.g.* never to go to Naples), it became possible, after the time of Mucius Scaevola, for the heir, even according to the civil law, to accept the *hereditas* immediately after the testator's death, undertaking by the *cautio Muciana* to restore the property if he broke the condition.

3. Substitutions.[1]

A substitution may be one of three kinds: (*a*) *vulgaris*; (*b*) *pupillaris*; (*c*) *quasi-pupillaris*.

(*a*) *Substitutio vulgaris* is the appointment of an alternative heir, *i.e.* the appointment of an heir to take the place of an heir instituted before him, in the event of the prior heir failing to take, *e.g.* because of—(i.) his death before the testator, or (ii.) his refusal or failure (within the time limited) to accept, or (iii.) his inability to accept owing to some provision of law.[2]

An instance of substitution is that given above in connection with the *cretio*, 'Let A be heir and decide

[1] G. ii. 174-184; J. ii. 15-16.

[2] *E.g.* the *lex Julia et Papia Poppaea*.

within 100 days, if not, let him be disinherited and let B be heir'.[1] Another would be, 'Let my son Balbus be heir, and if he fail to become so' (*i.e.* by reason of any of the events above mentioned), 'let Maevius be heir'.[2] As a final substitution a testator often appointed one of his slaves *necessarius heres*, to provide against all the preceding heirs refusing to accept because the *hereditas* was *damnosa*.

A testator might substitute one for several heirs, or several for one. If a testator originally appointed two co-heirs, A and B, he often substituted them reciprocally one to another, so that if A failed to become heir B became sole heir, and *vice versa*. Where several heirs were substituted, the share they acquired by substitution originally went to them equally, unless the testator expressly provided otherwise; but Antoninus Pius enacted that if the substituted heirs were already heirs in unequal shares they were to take what came to them by substitution in the same proportion; *e.g.* the testator appoints A heir to half the *hereditas*, B and C to one-fourth each, and

[1] Gaius tells us that if the *cretio* were in this form, A must formally accept within the time limited, or B becomes heir; it was not enough for A to accept informally by acting as heir (*pro herede gerere*). But if the *cretio* were *imperfecta*, *i.e.* if the words 'let him be disinherited' were omitted, and A did not formally accept but 'acted as heir', A and B shared equally; though if A did neither, of course B was sole heir by substitution. According to the Sabinians, A did not let in B for his half-share by 'acting as heir' until the time had expired within which he might, by a formal acceptance, become sole heir. The Proculians held that even while the *cretio* was running, A, by *pro herede gestio*, let in B, and could not afterwards by a formal acceptance, though in due time, displace him (G. ii. 176-178). It was provided, however, by Marcus Aurelius, that even although A merely informally accepted within the time (*i.e.* by acting as heir) it should be a good acceptance, and exclude the substitute.

[2] After Marcus Aurelius this implied a *substitutio pupillaris* also; *vide infra*.

they are reciprocally substituted. C fails to take. A will take two-thirds of the estate, B one-third.

Suppose A and B are instituted heirs, and B is substituted to A, and C to B. If A fails to take and B acquires his share, and then the dispositions in his favour fail, C obviously takes the whole *hereditas* as *substitutus* to B, who had it. But C would have taken even though B died before A, because C is, by implication, considered as substituted not only to B but to A also: *substitutus substituto censetur substitutus instituto.*

Suppose a testator instituted as heir A, who was really X's slave, but whom the testator believed to be a freeman *sui juris*, and made Maevius substitute. Then, if the testator died and A entered by X's order, X acquired the inheritance, and the substitution in favour of Maevius failed. But this was not what the testator meant, he intended Maevius to take if A failed to take the inheritance *in his own right.* Obviously A has not acquired it in his own right, but on behalf of his master, X. As a rough settlement, Tiberius decided that Maevius and the master should each take half.[1] But it appears from Justinian's *Code* that Maevius took the whole inheritance if it were proved that, had the testator known that A was not a freeman, he would not have instituted him.

(*b*) *Substitutio pupillaris* was where a *paterfamilias* provided against his infant child[2] surviving him, but dying under puberty, and so incapable of making a will himself. A testator might provide a substitute for each of his children who should die under

[1] J. xv. 4.

[2] Or grandchild, if on the testator's death the grandchild would not fall under the *potestas* of its own *paterfamilias.*

the age of puberty, or to the last who should die under that age,[1] and the substitution might be in favour of a named person or be general, *quisquis mihi heres erit idem impuberi filio heres esto*, in which case all the heirs of the father took by substitution in proportion to their shares in the inheritance.[2]

A *substitutio pupillaris* involved two wills, the father making, in effect, one for himself, another for the infant; and the ordinary form was: 'Let my son Titius be my heir, but if he fail to become my heir,[3] or if he becomes my heir and dies before he becomes his own guardian,[4] then let Seius be my heir'. But the father need not institute Titius heir, he might disinherit him, and, by the less common form of *pupillaris substitutio*, provide that if Titius died under puberty Seius was to succeed to any property the child might have of its own; *e.g.* bequests and gifts from relatives other than the father. But a *substitutio pupillaris* in every case terminated, *i.e.* the gift by substitution failed—(i.) when the child attained the age of puberty; (ii.) if the father's own will in any way failed to take effect, *e.g.* because no heir would enter; for the will made for the son by the substitution entirely depended on the father's own will (*nam pupillare testamentum pars et sequela est paterni testamenti*).[5] (iii.) It is sometimes said that the *substitutio pupillaris* also failed if the son died in his father's lifetime, or underwent *capitis deminutio*. But this depended upon the terms used. If the substitution were 'double', *i.e.* as above, 'if my son—(*a*) fail to become heir, or (*b*) become heir and die

[1] J. ii. 16. 6. [2] J. ii. 16. 7. [3] *E.g.* dies before the testator.
[4] *Priusquam in suam tutelam venerit*, *i.e.* under puberty.
[5] J. ii. 16. 5.

under puberty', obviously the words of the testator covered the case; *e.g.* if the son died in his father's lifetime he would fail to become heir, and the substitute would take under the very words of the will;[1] if, however, the substitution were simple, *i.e.* limited to the son becoming heir and dying *impubes*, then if for any reason, *e.g.* death, he failed to become heir, the gift of substitution would necessarily fail also. By much the same reasoning, if the substitution were to a *postumus* ('if a son is born to me let him be heir, and if he becomes heir and dies under puberty, let Seius be heir'), and if such son was ultimately born but died in his father's lifetime, the substitution failed, for the condition on which Seius had been appointed heir could not be fulfilled. After Marcus Aurelius, unless the testator expressly provided otherwise, every *pupillaris substitutio* was double, *i.e.* both *vulgaris* (*i.e.* if my son fail to become heir) and *pupillaris* (*i.e.* if he become heir and die *impubes*), for that Emperor enacted that one should imply the other.

Suppose that by a *substitutio pupillaris* Seius has been appointed heir as substitute to the testator's infant son Balbus. It was obviously to the interest of Seius that Balbus should die under fourteen, and it was therefore usual to take measures to guard against treachery. If Seius were substituted to Balbus—(*a*) if Balbus failed to become his father's heir, or (*b*) if he became heir and died under puberty—there would be, at first sight, no objection to substituting Seius on the first event in that part of the will which would be opened at the father's death, for then and

[1] Viz. by the *substitutio vulgaris* which the *substitutio pupillaris* contained.

not before would it be known whether Balbus were heir and Seius substitute. When this course was adopted the other substitution, *i.e.* of Seius to Balbus if Balbus, having become heir, died under fourteen, would be written in later tablets, annexed to the will, but tied up and sealed as a separate document, and the earlier part of the will would contain a direction that the later tablets were not to be opened so long as Balbus was alive and under age. But Gaius tells us that it was much safer to make both substitutions in the later tablets, because Seius would probably guess that if he was appointed substitute in the one event he was also substitute in the other. There would be no practical inconvenience in this course, because if, at the testator's death, Balbus had already died, and so failed to become heir, the later tablets could be opened at once without danger.

(*c*) *Substitutio quasi-pupillaris.*—Justinian enabled an ancestor having any insane descendants (although over puberty) to substitute persons as heirs to them. It could previously have been done only on petition to the Emperor. This kind of substitution differs from *substitutio pupillaris* in that—(i.) the right is not confined merely to a *paterfamilias*, but belongs even to a maternal ancestor; and (ii.) the substitution can only be made in favour of *certae personae*, *i.e.* it must be in favour of sane descendants of the insane persons. If there were none, then sane issue of the ancestor making the will; failing which, it could be in favour of anyone. On the analogy of the *substitutio pupillaris* such substitution became void when (if ever) the person in question recovered his mental capacity. If a descendant were incapable of making a will for any reason other than insanity,

the ancestor could only make a *quasi-pupillaris substitutio* for him by special licence from the Emperor.

It is hardly necessary to add that no *pupillaris* or *quasi-pupillaris substitutio* could be made in the case of an *extraneus* or in the case of a child of full age, unless the child were insane. The utmost a testator could do would be to impose a *fideicommissum*.

4. Legacies.

An ordinary will at Rome after the disherisons, the institutions, and the substitutions would contain the appointment of tutors for infant children (and, under the old law, for the testator's wife),[1] and such legacies and *fideicommissa* as the testator imposed upon his heir or heirs. Legacies are therefore here dealt with, and are followed by a description of *fideicommissa* in order to complete the account of the contents of a normal *testamentum*. A legacy differs from the institution of an heir or heirs, inasmuch as an heir is appointed to succeed to the whole estate (*hereditas*) of the testator or some definite part of it, *e.g.* to one-third of all the rights and of the obligations of the testator. A legacy, on the other hand, is not an instance of universal succession, it is a mode (like *traditio*) of acquiring *res singulae* (as both Gaius and Justinian admit); and is only discussed in this place, instead of with the other methods of acquiring *res singulae*, on the ground of convenience, *i.e.* because legacies are only found in connection with wills.[2] A legacy, accordingly, is a gift to a person named in the will (or codicil) of some specific thing or things and charged on the *heres*. Usually the thing is a *res corporalis*; *e.g.* a horse or furniture, but not neces-

[1] These appointments have already been discussed.
[2] G. ii. 191; J. ii. 20 *pr.*

sarily so, for it may be the release to a debtor of a debt owed to the testator, or it may be a gift of the right the testator had to receive payment from a third person, or it may consist of an obligation to do something (*e.g.* to build a house for the legatee) imposed upon the *heres*. Justinian defines a legacy in general terms : *Legatum itaque est donatio quaedam a defuncto relicta*. Ulpian adds that it must be imperative in form, if precative it will amount only to a *fideicommissum*. The subject may be considered under the following heads :

(*a*) How a legacy was given.
(*b*) What could be so given.
(*c*) The construction of legacies.
(*d*) Restrictions upon the total amount a testator could so bequeath.
(*e*) How a legacy might fail.

(*a*) *How a legacy could be given.*

Gaius tells us that originally a legacy was only valid if given in one of four ways, either—

(i.) *Per vindicationem*, or
(ii.) *Per damnationem*, or
(iii.) *Sinendi modo*, or
(iv.) *Per praeceptionem*.

(i.) A *legatum per vindicationem* was created by the use of the words ' *do lego* ' (' I give and bequeath ') or either of them,[1] the full form being, if, *e.g.*, the legatee is Titius and the legacy is of a slave : *Titio hominem Stichum do lego*. This form of legacy operated as a direct gift to the legatee, *i.e.* did not involve the heir handing it over to the legatee, and therefore, immediately the will came into operation by the

[1] Or, according to the better opinion, *sumito*, *capito*, or *sibi habeto*.

heir's entry, the legatee as owner could bring a real action (*vindicatio*) for the legacy, whether in the hands of the heir or of some third person. By this method, however, a testator could only bequeath things which belonged to him *ex jure Quiritium*, both when he made the will and at the moment of his death; the only exception being in favour of *res fungibiles*, in the case of which ownership at death was enough. Where the same thing was given in this way to two or more persons, whether *conjunctim*[1] or *disjunctim*,[2] each takes a share, and if any fail to take[3] his share accrues to the other legatees. According to the Sabinians the legacy vested in the legatee as soon as the heir entered, but he could refuse it; but the Proculians held it did not vest till the legatee assented. In the end the Sabinian view prevailed. If the legacy had been conditional, the Sabinians held that the ownership was in the heir meanwhile; the Proculians maintained it was a *res nullius*, but the former view seems to have gained acceptance.

(ii.) A *legatum per damnationem* was where the words used were '*damnas esto*', *e.g. Titio heres meus Stichum dare damnas esto*, and, as the expression suggests, this implied not a direct gift[4] of the thing to the legatee, but a personal obligation which was cast upon the heir to do something for the legatee's benefit. The legatee, accordingly, had an action, not to claim the thing, but against the heir, to make him carry out the duty which the testator had imposed. To discharge his obligation the heir had, if the thing were a *res mancipi*, to transfer it to the legatee by

[1] *E.g. Titio et Seio hominem Stichum do lego.*
[2] *Titio hominem Stichum do lego. Seio eundem hominem do lego.*
[3] *E.g.* by death before the legacy is due.
[4] As in the *legatum per vindicationem*.

mancipatio or *in jure cessio*, if a *res nec mancipi*, by *traditio*, though, of course, if the *res* were *res mancipi* and the heir merely made *traditio*, the legatee ultimately acquired *dominium* by means of *usucapio* in the usual manner. The peculiar advantage of this form of bequest was that the testator could give by it not merely his own property, but (*a*) what belonged to the heir or a third person (*res aliena*); in which latter case the heir was bound to buy and convey it to the legatee; (*b*) what would only come into existence at some future time, *e.g.* future crops, or a child to be born of some slave woman; or (*c*) the testator might not merely direct the heir to hand over something to the legatee but to do some act for him, *e.g.* build him a house. If the same thing were given *per damnationem* to two or more persons *conjunctim*, each was entitled to a share, but if the gift to one failed there was no accruer to the others; the share lapsed, and, before the *lex Papia*,[1] continued to be the heir's property. If the same thing were given *disjunctim* the whole legacy belonged to each legatee, so that the heir was bound to give the thing to one and its value to the other or to each of the others.

(iii.) A *legatum sinendi modo* was a modification of the last form, the words being *damnas esto sinere*,[2] *e.g. Heres meus damnas esto sinere Lucium Titium hominem Stichum sumere sibique habere*; and here, also, the remedy of the legatee was a personal action against the heir, the claim being for 'whatever the heir ought to give or do under the will' (*quidquid heredem ex testamento dare facere oportet*). Gaius tells

[1] P. 253.

[2] *I.e.* to 'permit' the legatee to take instead of obliging the heir to *give*.

us that a legacy of this sort was better than one given *per vindicationem*, but not so good as one *per damnationem*; for by this method a testator could give not only his own property but his heir's (which was impossible *per vindicationem*), but could not (as he might *per damnationem*) bequeath a *res aliena*. Since the heir was not bound *dare*, but only *sinere*, some jurists thought that the heir could not be compelled to make a formal transfer to the legatee (*e.g.* by *mancipatio*), but that it was enough if he allowed the legatee to take it. If a legacy were given *sinendi modo* to two or more persons *disjunctim*, some jurists thought that the whole belonged to each legatee, as in a *legatum per damnationem*, but others considered that once one legatee had been allowed to take the thing the obligation of the heir was at an end; the heir, it was argued, was only bound to 'permit', therefore, if after one legatee has obtained the legacy some other makes a claim, the heir can answer that he neither has the thing, so as to be able to 'let' the claimant 'take it', nor is it by reason of anything like fraud on the heir's part that the claimant cannot get what was left him.

(iv.) A *legatum per praeceptionem* was created by the word *praecipito*, *e.g. Lucius Titius hominem Stichum praecipito*. Since *praecipito* means literally 'let him take before', the Sabinians held that a legacy could only be given in this way to one of two or more co-heirs, who was to take some specific item of the *hereditas* before dividing the estate up. The Sabinians, therefore, considered that a legacy given *per praeceptionem* to any person but a co-heir was invalid, and not even cured by the *S.C. Neronianum*;[1]

[1] *Infra*, but Julian held otherwise (G. ii. 218).

further, that a co-heir to whom such a legacy was given could only obtain it by the heir's action, *judicium familiae erciscundae*; and that, since nothing save what belonged to the *hereditas* could be sued for by this action, a testator could not bequeath *per praeceptionem* anything save his own property, the only exception being where the thing bequeathed had originally been the testator's, but had been mortgaged to a creditor by a *mancipatio fiduciae causa*. The Sabinians held that in such a case a *legatum per praeceptionem* gave the legatee a right to require the other heirs to pay the creditor, who would then mancipate the property to the legatee. The Proculians, on the other hand, held that *prae* was superfluous, and that, therefore, a legacy given in this way was, in effect, a legacy *per vindicationem*, and so possible even to a third person, whose remedy would be a real action for its recovery (*vindicatio*), and, according to Gaius, the Proculian view was confirmed by Hadrian.[1] It differed from a legacy *per vindicationem* in that it need not be quiritary property, and might have been acquired after the making of the will. According to both schools, a legacy *per praeceptionem* to two or more persons, whether *conjunctim* or *disjunctim*, entitled each to an equal share, as in the case of a legacy *per vindicationem*.

Even in the time of Gaius these *formulae* had lost much of their former importance by virtue of the *S.C. Neronianum*, A.D. 64, the exact meaning of which is doubtful, but which seems to have enacted that if a legacy were in danger of failing because the testator had used inappropriate words,[2] it should be treated

[1] Gaius, however, is doubtful about this (G. ii. 221).
[2] Cf. G. ii. 218.

as if given *optimo jure, i.e. per damnationem.* If, therefore, to take an example, a testator gave a *res aliena per vindicationem,* the *S.C.* saved the legacy, because it was regarded as given *per damnationem* ; another instance (given by Julian) is of a legacy given *per praeceptionem* to a stranger. On the other hand, if the legacy was in danger of failing because of some personal defect in the legatee (*e.g.* he was a *Latinus Junianus* or a *peregrinus*), the *S.C.* had no application,[1] and it would seem that even after the *S.C.* the Latin language was necessary. Constantius, however, enacted (A.D. 339) that any words should thenceforth suffice, whether Latin or Greek, and Justinian placed all legacies, however given, on the same footing,[2] and enacted that all advantages enjoyed by *fideicommissa* should be thenceforth enjoyed by legacies.[3] If the property belonged to the testator the legatee could sue for it by a real action, whether it was in the hands of the heir or of a third person ; and whether the legacy belonged to the testator or not, the legatee had his personal action against the heir ; the rights of the legatee being further secured by an implied mortgage (*tacita hypotheca*) over all the property which the heir himself received from the inheritance.

(*b*) *What could be given as a legacy.*

Speaking generally, any *res* which was not *extra commercium,*[4] whether *corporalis* (as a slave) or *incorporalis* (as a release from debt), could be given as a legacy, but the following cases require special notice :

[1] Cf. G. ii. 218.

[2] *Ut omnibus legatis una sit natura* (J. ii. 20. 2).

[3] And *vice versa.*

[4] If the testator gave such a legacy, *e.g.* the Campus Martius or a temple, it was invalid (*nullius momenti*) (J. ii. 20. 4).

(i.) A legacy might be of a portion of the *hereditas* itself, *e.g.* one-eighth of all the rights and obligations of the testator. A legacy of this sort was called *legatum partitionis*, because the legatee shares (*partitur*) with the *heres*, and the legatee himself was known as *legatarius partiarius*. According to the theory of the *jus civile* it was impossible to carry out the intention of the testator literally, because the only legal manner by which a share of the *hereditas* could be given to a person was by making him heir. The result which the testator wished therefore could not, at law, be effected, and what was done was (in effect) as follows: A calculation was made and, in the case supposed, it would be ascertained what constituted an eighth part of the testator's corporeal property (land, slaves, furniture, etc.), and what an eighth of his incorporeal rights (*e.g.* to have debts or damages paid to him), and what an eighth of his liabilities (*e.g.* for debts or damages). Then the heir transferred (by *mancipatio* or *traditio*) the eighth part of the land, etc., to the *legatarius partiarius*, and covenants were entered into between the heir and legatee (*stipulationes partis et pro parte*); the heir engaged to make over to the legatee one-eighth part of debts and damages due to the testator, the legatee to indemnify the heir against the same proportion of the liabilities.

(ii.) Originally, as above stated, a testator could impose upon his heir (*per damnationem*) [1] the obligation to transfer to a legatee the property of a third person (*res aliena*), or, if the heir could not buy it, to pay the legatee its value, but by Justinian's time this

[1] Under Justinian, of course, a legacy of a *res aliena* could be given in any form (*vide supra*).

had been modified, for a rescript of Antoninus Pius provided that the legacy of a *res aliena* had no effect unless the testator knew that the thing was not his own property,[1] and the burden of proof was upon the legatee.

(iii.) If the legacy were of some property mortgaged to a third person at the date of the will, the heir had to redeem the mortgage for the benefit of the legatee, but after a rescript of Severus and Antoninus, only if the testator was aware of the mortgage.[2]

(iv.) A gives a legacy (*e.g.* of land) to B, and afterwards sells or mortgages it. The effect was disputed in the time of Gaius: some jurists thought that though the legacy was still due the legatee could be defeated by the *exceptio doli*.[3] Celsus, however, considered the legacy ought to be paid if the testator when he sold or mortgaged did not intend to revoke the legacy, and this opinion was confirmed by a rescript of Severus and Caracalla.[4]

(v.) A gives a *res aliena* belonging to C as a legacy to B. By the time when the legacy becomes due B has already obtained the *res*. If B bought the thing he can claim the value from the heir, but he cannot if he obtained it gratuitously (*causa lucrativa*), *e.g.* by a gift *inter vivos* from C or under C's will: *nam traditum est duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse*.[5] In like manner, if A leaves C's farm to B, and B before the legacy is due acquires a usufruct in the farm by way of gift, and buys the *dominium*, he can sue the heir for the farm (*i.e.* both the usufruct and the

[1] J. ii. 20. 4.

[2] J. ii. 20. 5. 'Antoninus' is probably a mistake. Caracalla must be meant.

[3] G. ii. 198. [4] J. ii. 20. 12. [5] J. ii. 20. 6.

dominium), but will only recover what he gave for the *dominium*.

(vi.) A legacy of what already belongs to the legatee is invalid (*inutile*), and remains so though he parts with it before the legacy becomes due, for, by the *regula Catoniana*, a legacy which was invalid when the will was made cannot be cured by after events (*quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum quandocumque decesserit non valere*).

(vii.) A gives B a legacy of A's own property, thinking, by mistake, either that it is a *res aliena* or that it belongs to B. The legacy is good.

(viii.) If the legacy is a release from a debt (*legatum liberationis*) the heir cannot recover the money from the debtor, who, if he wishes, can compel the heir to release him formally, *e.g.* by *acceptilatio*.

(ix.) Conversely, A, who owes B fifty *aurei*, gives B the money by his will. The legacy (*legatum debiti*) is invalid, for B gets no benefit by the legacy; he can sue the heir as a creditor of the estate. But if A owing the money conditionally gives it absolutely, or before it is due, the legacy is good.[1]

(x.) A gives his wife B her *dos* as a legacy (*legatum dotis*).[2] If A has actually received the *dos* the legacy is good, because B has a better remedy for its recovery as a legacy than she would by an action founded on the *dos*. If he has never received it, then if the *dos* is bequeathed in general terms the legacy is void for uncertainty, but if A said, 'I give my wife fifty *aurei* which she brought me as *dos*', or 'the house I live

[1] J. ii. 20. 14.

[2] *Dotem praelegare—prae*, because the wife obtains the *dos* so given earlier than by the ordinary action.

in, which is mentioned in our marriage settlement', the legacy is good, although no *dos* or marriage settlement had in fact been given or executed.

(xi.) If the legacy is of a debt due to the testator (*legatum nominis*) the heir must sue for the benefit of the legatee, unless the legacy has become void because the testator received payment in his lifetime.[1]

(xii.) *Legatum generis* was where the testator gave a *res non fungibilis* without specifying it in definite terms, *e.g.* I give Titius a slave. If the estate comprised such an object the legacy was valid and Titius had the choice, but he could not choose the best.

(xiii.) *Legatum optionis* is akin to the *legatum generis*, but the legatee is expressly given the right to make a choice (*e.g.* 'I give Titius any one of my slaves he may choose'), and he may choose the best of the genus. Formerly, if Titius died before making the choice the legacy failed, but Justinian extended the right to his heir. Also, before Justinian, if there were several legatees to whom a *legatum optionis* was given, or several heirs of one legatee and they were unable to agree, the legacy was void. Justinian provided *ne pereat legatum . . . fortunam esse hujus optionis judicem*, *i.e.* they drew lots.

(c) *The construction of legacies.*

(i.) A legacy could only be given to a person with whom the testator had *testamentifactio*,[2] and in the time of Gaius[3] could not be made in favour of an *incerta persona*,[4] *e.g.* 'whoever shall come to my funeral'; among *incertae personae* were reckoned

[1] J. ii. 20. 21.

[2] P. 259.

[3] For Justinian's changes see ii. 20. 27.

[4] But a gift to one of an ascertained class was good, *e.g.* 'to any one of my *cognati* now alive who shall marry my daughter'.

postumi alieni, *i.e.* all *postumi* except persons who on birth become *sui heredes* of the testator, *e.g.* a grandchild begotten to a son who has been emancipated would be a *postumus alienus* in this sense.[1]

(ii.) A gives a legacy to B, who is under the *potestas* of C, A's heir, *e.g.* is his slave. The Sabinians considered this a valid legacy if given conditionally upon the slave being free when the legacy was due, invalid if unconditional. The Proculians considered it bad in either case, because of the *regula Catoniana* (*vide supra*). In Justinian's time the Sabinian view was the accepted one,[2] on the ground that the *regula Catoniana* did not apply to conditional legacies.

(iii.) Conversely, if A appoints B's slave C heir and gives B a legacy, then if C remains in B's power and enters upon the *hereditas* on his behalf, the legacy fails, because B cannot owe a legacy to himself. But if C is emancipated or sold to another master in A's lifetime, B's legacy is valid.

(iv.) A mere mistake by the testator as to the legatee's *nomen*, *cognomen*, or *praenomen* has no effect if it is clear whom he meant.

(v.) *Falsa demonstratio non nocet*; *e.g.* 'I give as a legacy to my slave Stichus, whom I bought of Seius'. This is a good legacy, though the *demonstratio* or description is inaccurate, because the testator, in fact, bought the slave from Titius. Another example is given above in connection with the *legatum dotis*.

(vi.) *Falsa causa non nocet*; *e.g.* 'I give a legacy to Titius because he managed my business in my absence'. Titius never did so, but takes the legacy in spite of the testator's mistake as to the reason (*causa*) for it, unless the reason amounts to an actual

[1] G. ii. 241. [2] J. ii. 20. 32.

condition ; *e.g.* 'I give my slave to Titius *if* he shall have managed my affairs'.

(vii.) Gaius says that a legacy given 'when my heir shall die', or 'on the day before my heir shall die', or *poenae nomine* (*e.g.* 'if my heir gives his daughter in marriage to Balbus, then let him give 1000 *aurei* to Seius'), was in each case invalid. Justinian made all these kinds of legacy possible, but in the case of a *legatum poenae nomine* only if there were nothing impossible, illegal, or immoral about it.[1]

(viii.) If the thing which is given as a legacy is lost or destroyed the loss falls upon the legatee, unless it was occasioned by the fault of the heir, so if A gives D's slave as a legacy to B, and D manumits the slave before the legacy is due, the legacy fails, unless D was persuaded to manumit the slave by A's heir, when, of course, the heir must compensate B. If A makes C his heir and gives C's slave to B as a legacy, and C manumits the slave, he must compensate B.

(ix.) A gives as a legacy to B 'a female slave with her offspring'; if the former die, B still takes the offspring. So, too, if the legacy is of 'a principal slave and his assistants' (*vicarii*) and the principal slave dies.

(x.) A bequeaths to B, A's slave Stichus 'with his *peculium*'; the legacy of the *peculium* fails with the legacy of the slave, *e.g.* if the slave die before the testator, for the *peculium* is merely accessory to the slave, and the rule is that the accessory follows the principal.

(xi.) Land is given as a legacy 'with its accessories', *e.g.* farm implements. If the land is sold and the testator intended thereby to revoke the legacy, B does not take the accessories.

[1] J. ii. 20. 35-36.

(xii.) If the legacy is of a flock which afterwards is reduced to a single sheep, *e.g.* by death, the legatee can claim it, although, of course, it is no longer a flock.

(xiii.) Any additions to a flock or a building after the date of the will belong to the legatee.

(xiv.) If a slave is given his freedom by will, this does not of itself carry with it a legacy of his *peculium*, although had the slave been manumitted by his master in his lifetime he would have taken his *peculium* unless the master expressly deprived him of it. But on manumission by will the slave may take his *peculium* if it appears, either expressly or by implication, that the master so intended. If the slave is given his *peculium* as a legacy, together with his freedom, he takes not only the *peculium* as it stood at the testator's death but all additions to it between the death and the heir's entry.

(xv.) If the *peculium* is given as a legacy to C, a third person, C takes it as it stood at the death of the testator, but with regard to additions made between the death and the heir's entry C only gets acquisitions made by means of something forming part of the *peculium* (*ex rebus peculiaribus*).[1]

(xvi.) The law with regard to a legacy of the same thing being made to two or more persons has been stated already as it stood in the time of Gaius. Justinian states the law in his time as follows: 'If the same thing be given as a legacy to two persons either *conjunctim* or *disjunctim*, and both take the legacy, it is divided between them. If the legacy to either fails the whole goes to the co-legatee.'[2]

(xvii.) *Dies cedit—dies venit.* The former is the

[1] J. ii. 20. 20. [2] J. ii. 20. 8.

term applied to the time when the legatee's right to the legacy comes into existence, the latter (*dies venit*) when the right can be first enforced by action. Originally *dies cedit*, on the death of the testator, if the legacy were unconditional; and though the *lex Papia Poppaea* made the date the opening of the will, Justinian restored the old date. If the legacy were conditional, *dies cedit* when the condition was fulfilled. *Dies venit* when the heir made *aditio* as a general rule, but the date might be later, *e.g.* if the testator so declared, or if there were a condition to the legacy which was still unfulfilled.

(*d*) *Restrictions on the amount of legacies.*

The generosity of a Roman testator in the matter of legacies[1] might easily prejudice the legatees rather than the heir, because if a testator left so many legacies as to render the estate (or rather the residue) worthless, the heir might refuse to enter, and in such case the legacies fell to the ground; while the heir, if, *e.g.*, a *suus heres*, might be entitled to the property as on an intestacy, taking it, of course, free from legacies. To prevent an intestacy, which for some obscure reason was regarded by the Romans as a serious misfortune,[2] three several enactments were passed, of which the last only succeeded in its object. The first law, the *lex Furia*,[3] enacted that no legatee (save near relatives) could claim more than 1000 *asses* as a legacy, the second, the *lex Voconia* (169 B.C.), that no legatee should take more as a legacy than the

[1] Which was apparently subject to no restriction by the early law, since the XII Tables provided *uti legassit super pecunia tutelave suae rei ita jus esto.*

[2] The reason for this 'horror of intestacy' has been variously explained. See Buckland, p. 361.

[3] Of uncertain date, but before Cicero.

heir got out of the estate. But, obviously, a testator could satisfy the provisions of either law, and yet, by leaving a sufficient number of legacies, render the estate in the hands of the heir practically worthless. Finally the difficulty was solved by the *lex Falcidia*, 40 B.C., which required that the total amount given in legacies should never exceed such a sum as would allow the heir to keep at least a fourth part of the *hereditas*. In other words, whatever the amount given in legacies, the heir must get at least his fourth (*quarta Falcidia*), and, if necessary, the legacies diminish. If there are two or more heirs, each gets a fourth of his share of the *hereditas*, whatever it may be, and the calculation is made for each heir separately (*in singulis heredibus ratio legis Falcidiae ponenda est*[1] —the principle of the Falcidian Law is to be applied in the case of each heir separately); *e.g.* A institutes B heir to half of his estate, C to the other half. A imposes no legacies on B, but so many on C as to exhaust or nearly exhaust his share. As to B, the *lex Falcidia* is unnecessary; it applies, however, to C, who will get one-fourth of his half, and the legatees will only be entitled to payment of their legacies out of the remaining three-fourths of the half-share, the legacies abating proportionately.

In order to ascertain the value of the *hereditas*, an estimate was made of it *as at the testator's death*. From the gross value of the estate, deductions were made in respect of—(i.) the expenses of winding up the estate; (ii.) the debts of the testator; (iii.) the value of slaves who had been freed; (iv.) the funeral expenses. What was left was the 'net' *hereditas*, and of this the heir must get at least one-

[1] J. ii. 22. 1.

fourth, the remaining three-fourths being divided up among the legatees, if the testator had given them as much. If he had given less, of course there was no need for the *lex Falcidia*, for the heir obtained more than one-fourth under the will. When the legacies had to be reduced the reduction was proportionate; *e.g.* the estate is worth 400 *aurei* net. A is heir, and B, C, D, and E each has a legacy of 100 *aurei*, thus exhausting the estate. The *lex Falcidia* automatically reduces each legacy to 75 *aurei*, making 300 *aurei* in all, and A, accordingly, gets 100 *aurei*, being his *quarta Falcidia* of the *hereditas*.

Since the value is fixed at the testator's death, it is the heir who benefits or loses by the estate subsequently increasing or diminishing in value; *e.g.* X makes A heir and gives 100 *aurei* to B as a legacy. The net value of the estate at X's death is 100 *aurei*, and B's legacy is cut down to 75 *aurei*. If, however, the estate is worth 500 *aurei* when A enters (*e.g.* by the birth of slaves and cattle), A benefits, B's legacy remaining at 75 *aurei*. Conversely, A is heir, B is legatee of 75 *aurei*, and the net estate at death is ascertained at 100 *aurei*. B will be entitled to his 75 *aurei*, although before A enters the value of the estate falls to 75 *aurei* or less (*e.g.* by the death of a slave). But, of course, B will not get his legacy at all unless A enters, and B will probably, therefore, come to some arrangement with A, so as to make it worth his while to do so.

The *lex Falcidia* never applied to the will of a soldier,[1] and Justinian enacted that it should have no application where the testator himself expressly

[1] For the privilege of soldiers generally in the matter of wills, *vide infra*.

so provided. Further, in Justinian's time, the benefit of the *lex* was lost to the heir when he renounced the right or was deprived of it for neglecting to make an inventory according to Justinian's provisions, or for attempting to defraud the legatees, or where he accepted only under compulsion. Finally certain kinds of legacies were, exceptionally, unaffected by the *lex Falcidia*, *e.g.* gifts to charities.

(*e*) *How a legacy might fail.*

(i.) By the will which bequeathed it being void or failing to take effect, *e.g.* the *heres* refusing to enter.

(ii.) By express revocation (*ademptio*). In the time when the old formulae were necessary to give a legacy, such legacy had to be revoked in an equally formal manner, *i.e. contrariis verbis* (*e.g. non do lego*). But long before Justinian the revocation could be informal; *e.g.* by the disposition being erased from the will, or by any declaration (by will or codicil) that the legacy was not to take effect.

(iii.) By implied ademption; *e.g.*—(*a*) alienation of the thing, unless the legatee could prove that the testator did not by alienation intend to revoke the legacy; (*b*) great enmity subsequently arising between the testator and legatee.

(iv.) By the destruction of the subject-matter of the legacy.

(v.) If the legatee lost the right to take; *e.g.* died before *dies cessit*.

(vi.) *Translatio*; *i.e.* if the testator, by will or codicil, transferred the legacy from one person to another; *e.g. hominem Stichum quem Titio legavi, Seio do lego*.[1]

(vii.) By reason of the *lex Falcidia*.

[1] J. ii. 21. 1.

(viii.) Acquisition of the thing *ex lucrativa causa* (*supra*).

(ix.) In the case of a legacy to a debtor of the exact amount of his debt.

(x.) By the refusal of the legatee to accept.

5. *Fideicommissa.*

The many formalities with regard to the institution of heirs and the bequest of legacies, coupled with the fact that many persons, *e.g. peregrini*, were incapable of being instituted heirs, or of being given a legacy, led, in the late Republic, to testators leaving directions to their heirs in favour of given individuals, which, though not binding at law, they hoped their heirs would, in honour, feel bound to carry out. The beginning of *fideicommissa*, therefore, was very like the early practice with regard to trusts in English law, and, as in the case of trusts, a time came when trusts were made binding legally as well as morally. Justinian [1] tells us that the Emperor Augustus ordered the consuls, in certain cases, to interpose their authority in order to enforce *fideicommissa*, and that since this measure proved popular, a regular jurisdiction soon came to be established over these hitherto informal bequests, and a special praetor was appointed to deal with them, who was called the *praetor fideicommissarius*. For brevity, the *fideicommissum* will here be called 'the trust', the person upon whom it was imposed (*fiduciarius*) 'the trustee', and the person in whose favour it was imposed (*fideicommissarius*) 'the beneficiary'.

The following were the chief points of original difference between legacies and trusts:

(i.) A legacy must be given in a formal manner;

[1] J. ii. 23. 1.

any informal declaration of intention, even a nod, might be enough to constitute a trust.

(ii.) A legacy could not exist apart from a will; a trust could be imposed by will, but might be placed upon a man's intestate heir.

(iii.) A legacy could be claimed by an ordinary action; whereas even when trusts gained recognition, the action was an administrative one only, given by the *praetor fideicommissarius* in the exercise of his *extraordinaria cognitio*.

(iv.) Anyone might be the beneficiary under a trust; while a legatee might be disqualified as not having *testamenti factio*, or under the *lex Voconia*,[1] or the *leges Julia et Papia Poppaea*.[2]

(v.) Since the *lex Falcidia* applied only to legacies, a testator (once trusts were enforced) could, by a series of such trusts, instead of legacies, once more make his estate practically worthless in the hands of his heir.

In the course of time, however, while the strict rules of legacies became, as has been shown, relaxed in favour of the principle of giving effect to the intention of the testator,[3] the rules relating to trusts lost much of their elasticity. Peregrines were early forbidden to take under trusts. The *S.C. Pegasianum* (A.D. 70) not only extended the principle of the *lex Falcidia* to trusts, but enacted that *coelibes* and *orbi* who were disqualified from taking legacies by the *leges Julia et Papia Poppaea* should be incapable of taking by way of trust, and under Hadrian *incertae personae* who could not take legacies were declared also incapable of benefiting by trusts. Finally, under Justinian's legislation, trusts and legacies were placed

[1] Pp. 248 and 261. [2] P. 262. [3] *E.g.* by the *S.C. Neronianum*.

upon the same footing, and were given the same remedies, even the informality in the manner of bequest disappearing, for a trust to be legally enforceable had to be duly witnessed.[1] If, however, the bequest had been by a mere declaration[2] (*i.e.* not duly witnessed), the rule was the same as that above stated with regard to codicils ; the beneficiary might require the person upon whom he alleged the trust to have been imposed to deny on oath the existence of the trust. If he refused the oath, he would have to carry out the trust.

A trust might be either of one or more *res singulae*, or of the whole *hereditas* or part of it.

A trust of res singulae.—A man might request his heir (under his will or on an intestacy) or a legatee to give or do something for the use of the beneficiary, but no one could be so obliged to give more than he himself received ; and where the trustee was the heir, he was entitled, after the *S.C. Pegasianum*, to keep, whatever the amount of legacies and trusts imposed upon him, at least a quarter of the *hereditas*, or (if one of several co-heirs) a quarter of his share of it. If the trust took the form of a direction to liberate a slave, if the slave were the slave of a third person, the trustee would be bound to buy and manumit him. If the master refused to sell, as he might if he himself had received no benefit from the person creating the trust, the gift of liberty was not extinguished but suspended,[3] because it might become possible in the future for the slave to be bought and freed. Even where the slave was the slave of the

[1] By five witnesses, as in the case of codicils.
[2] *Fideicommissum orale.*
[3] Otherwise in the time of Gaius (G. ii. 265).

person creating the trust, the slave did not become his *libertus*, but the *libertus* of the trustee who freed him, who thereupon became his patron. This was one of the few points of difference in Justinian's time between the operation of a legacy and a trust; for a slave directly freed by will became *orcinus*, *i.e.* the freedman of a deceased person, the testator, not of the heir.

A trust of the hereditas.—Fideicommissum hereditatis.

This sort of trust arose when a man directed his heir (whether testamentary or intestate) to hold the *hereditas* in trust (*i.e.* by way of *fideicommissum*) for some third person, so that really this third person (the beneficiary) was to succeed to the whole *hereditas*, the heir being merely a figure. The device was specially useful, and perhaps was first resorted to, where the beneficiary could not be the *jus civile* heir, *e.g.* was a *peregrinus*. At first, however, even when the legal validity of trusts came to be recognised, the transaction could not be exactly and literally carried out, since the heir, though made trustee and though willing to execute the trust, could not divest himself of his heirship. The maxim *semel heres semper heres* prevented anyone but the heir himself suing the debtors of the estate and so realising it, and he was also the only person whom the creditors of the estate could sue. Accordingly a plan was adopted under which the beneficiary (B) was put *emptoris loco*, *i.e.* in the position of a purchaser of the estate. The heir (H), by a fictitious *mancipatio* (*i.e.* for a single coin), sold the *hereditas* to the beneficiary, and, since *mancipatio* was inoperative to convey obligations, the sale merely vested in B the

res corporales of the *hereditas*. H and B, therefore, entered into mutual covenants (*stipulationes quasi emptae et venditae hereditatis*), H to hand over to B the assets of the estate as and when he received them, and that, if necessary, B might sue the debtors of the estate in H's name ; B that he would reimburse H against claims made by creditors of the deceased. If the heir were asked to hand over part of the *hereditas* only, the transaction was like the proceedings where part of the estate was given as a legacy (*partitionis*) ; the sale (mancipation) would be limited, *e.g.* to half the *hereditas*, and the stipulations entered into would be *partis et pro parte*. Obviously the above plan might prove much to H's disadvantage. Suppose H is asked to transfer to B the whole *hereditas*, and that, *e.g.*, the corporeal items (land, etc.) of the estate are worth 50 *aurei*, the debts due to it 100 *aurei*, and the debts owed by it 90 *aurei*. H transfers the land and other corporeal property to B, and gets in and pays to him the debts due. B thus receives 150 *aurei*, and may lose them at once and the rest of his property in rash speculation. When, therefore, the creditors of the estate compel H to pay them he will be 90 *aurei* out of pocket, together with the money he spends in trying to enforce B's covenant of indemnity.

To avoid this possibility, and to abolish the clumsy process above described, the *S.C. Trebellianum* was passed (*circa* A.D. 57), and this *S.C.* (as modified by the *S.C. Pegasianum*, A.D. 70) governed the proceedings in the time of Gaius, when B was sometimes *heredis loco* (viz. when the *S.C. Trebellianum* applied), sometimes *legatarii loco* (viz. when the *S.C. Pegasianum* was invoked). The *S.C. Trebellianum* provided

that, as soon as H assented to the *hereditas* vesting in B, all actions which might have been brought by or against H should be allowed to and against B, and thenceforth the praetor, acting on the *S.C.*, permitted B to sue and be sued[1] as if he were heir; hence he is termed by Gaius *heredis loco*. B, it is true, was only heir in equity, but he had all the practical advantages of heirship; and although the *S.C.* did not repeal the letter of the maxim *semel heres semper heres*, it destroyed its reality, for if A were sued by the creditors after the transfer, he could defeat them by pleading the *exceptio restitutae hereditatis*, or, as it was sometimes called, the *exceptio S.C. Trebelliani*.

Since, however, a trust depended as much as a legacy on the heir making *aditio*, it is obvious that, where H was asked to transfer the whole or the greater part of the *hereditas*, he might well refuse, as himself receiving no benefit, and the trust accordingly might wholly fail. To remedy this the *S.C. Pegasianum* was passed, which allowed the heir (as under the *lex Falcidia* with regard to legacies) to retain a fourth part of the *hereditas*, and the principle was extended also to cases where the heir was only one of several, where, of course, he retained one-fourth, not of the whole *hereditas*, but of the share to which he had been instituted. The *S.C.* further provided that if H declined to make *aditio* (*e.g.* because he thought the *hereditas* was *damnosa*), B, the beneficiary, might obtain an order from the praetor to compel him, and in such case H neither gained nor lost; the transfer was deemed to be governed by the *S.C. Trebellianum*, B could sue and be sued, *heredis loco*, H could plead the *exceptio restitutae hereditatis* when sued.

[1] By an *actio utilis*.

The *S.C. Pegasianum* did not repeal the earlier statute, but modified it, and it was only when less than a quarter of the estate was left to H that the *S.C. Trebellianum* had no application, and in this case the relations between H, B, and the debtors and creditors of the estate were as under the old system[1] before the *S.C. Trebellianum*. The statement made by Gaius, therefore, that B, formerly *emptoris loco*, was in his time *aliquando heredis loco, aliquando legatarii*, becomes intelligible. B was *heredis loco* when the *S.C. Trebellianum* gave actions to and against him, and protected H by the *exceptio restitutae hereditatis*, viz.—(i.) when H was not requested to transfer more than three-quarters of the *hereditas*; (ii.) when H refused to enter and the praetor compelled him. B was *legatarii loco* when less than a quarter of the *hereditas* was left to H. Then if H entered and relied upon the *S.C. Pegasianum* to secure his fourth, there was a mock sale of the part transferred to B, and stipulations *partis et pro parte*, as in the case of *legatum partitionis*; if H did not rely upon *S.C. Pegasianum*, there was a sale of the whole estate, and stipulations *quasi emptae et venditae hereditatis*. It will be noticed that, though B is spoken of as *legatarii loco* in both cases, the expression is more applicable to the first case, viz. where H relied on the *S.C.* for his fourth; B's position being then exactly *legatarii loco*, viz., a legatee to whom a share of the *hereditas* had been bequeathed. In the second case (where the stipulations were *quasi emptae et venditae hereditatis*) B's position, though more like that of a legatee than that of an heir, might equally well be described as *emptoris loco* as under the system prior to the *S.C. Trebellianum*.

[1] Viz., a fictitious sale with stipulations.

One more point in relation to the *S.CC.* must be noticed before passing to Justinian's changes. H might be asked to hand the *hereditas* to B after reserving in his own favour, not a definite part of the *hereditas*, but some specific thing or things, *e.g.* land or slaves. In this case, however valuable the specific gifts might be, and even though they amounted to the greater part of the estate, all the actions passed to and against B when H assented to the transfer of the *hereditas*, and H escaped liability.[1]

Justinian embodied the two *S.CC.* into one, retaining the advantages of each. The heir was to be entitled to at least his fourth, if he wished to retain it, in every case, and the mock sale and stipulations were to be in every case unnecessary. The actions were to pass to and against the beneficiary in proportion to the share of the estate transferred to him, who was thus always made *heredis loco* so far as his share was concerned, and the heir remained heir in proportion to the part he retained, *i.e.* to that extent actions lay for and against him. Finally, as under the *S.C. Pegasianum*, the heir refusing to enter could be compelled to do so, but at the same time he escaped all liability.

C. *Testamenti factio.*

Testamenti factio has three aspects: (*a*) *Testamenti factio activa* denotes the power to make a will, (*b*) *passiva* the capacity to receive benefits under one, while (*c*) a third kind of *testamenti factio* is the capacity to witness a will.

(*a*) *Testamenti factio activa.*—Only persons who had the *jus commercii* and were under no disability could

[1] Cf. J. ii. 23. 9. The law in this respect seems to have been unchanged by Justinian's legislation.

make a will, and, in ordinary cases, they had to possess the right not only at the date of their will, but also at death. A slave[1] and a *filiusfamilias* were incapable, being *alieni juris*, except that a *filius* could dispose by will of his *peculium castrense* while on military service, and, after Hadrian, at any time, and of his *peculium quasi-castrense*, under Justinian; for in relation to them he was regarded as an independent proprietor. An *impubes* was incapable, because, although he might be *sui juris*, his tender years disabled him, and the same lack of capacity attached to a *furiosus* and to a *prodigus* who had been forbidden by the praetor to manage his affairs. A *Latinus Junianus*, not having the *jus commercii mortis causa*, a *Dediticius*, having no *commercium* of any kind, and a person made *intestabilis* by the Senate's decree (*e.g.* because condemned *ob carmen famosum*), were equally incapable of testamentary disposition. If a Roman citizen were captured in war, and so became a slave, he lost capacity, and any will made during captivity was invalid, even though afterwards he escaped and returned to Rome. But if he had already made a will before capture, it remained good, whether the citizen returned or not. If he returned, it was good by the *jus postliminii*, *i.e.* by the fiction that he had never been captured; if he did not return, but died in captivity, by the *fictio legis Corneliae*, which assumed that a Roman citizen dying in captivity had never been taken prisoner at all, but had died at the moment of capture.

In the time of Gaius a person who was deaf or dumb was incapable of will-making: the former be-

[1] But a public slave of the Roman people might dispose by will of half his *peculium*.

cause he could not hear, and the latter because he could not utter, the nuncupative part of the *mancipatio*; but Justinian removed the incapacity, except in the case of those who had been deaf and dumb from birth. A blind man, it would seem, could always make a will, but in Justinian's time special formalities were necessary; for besides the usual seven witnesses, a notary, or if one could not be found, an eighth witness was necessary, and the will had to be read aloud. The position of women under *perpetua tutela* with regard to will-making has been discussed above.[1]

(*b*) *Testamenti factio passiva* is the right to be instituted heir by or to be given a legacy under a will,[2] and it was necessary that the person in question should possess it, not only at the date of the will and the time of the testator's death, but also at the date of the entry (*aditio*). *Testamenti factio passiva*, however, was possessed by many persons to whom the right to make a will was denied, for everyone who was either a citizen, or subject to the *potestas* of one, could take under a will, even though under incapacity; *e.g.* in spite of being a *furiosus*, *impubes*, etc. The chief examples of those unable to benefit by a will, therefore, were *peregrini*, *Latini Juniani*,[3] *dediticii*, persons pronounced *intestabiles*, *incertae personae*,[4] and persons disqualified by statute on the ground of public policy; *e.g.* in the time of Justinian heretics, apostates, and the children of persons convicted of treason. By the *lex Voconia* a woman could not be instituted heir by a testator whose

[1] P. 120.

[2] As already pointed out, originally many persons could benefit by *fideicommissa* who had not *testamenti factio passiva*.

[3] Unless they acquired *civitas* within 100 days.

[4] As to *postumi*, *vide supra*, p. 214.

fortune, according to the *census*, amounted to or exceeded 100,000 *asses*, but this disqualification became obsolete early in the Empire, owing to the *census* ceasing to be taken. Another example of a statutory disqualification is afforded by the *leges Julia et Papia Poppaea*. The *lex Julia* took from the *coelebs* (*i.e.* an unmarried person) the capacity to receive benefits under a will unless the testator were related to him within the sixth degree, or unless the *coelebs* married within 100 days from the date when the contents of the will were known. Under the *lex Papia Poppaea*, *orbi* (childless persons)[1] were only permitted to take half the benefits conferred upon them by will, unless the testator were, as in the case of the *lex Julia*, a near relative. But the effect of these two laws differs from that of ordinary disqualification. The *coelebs* and the *orbus* are not deprived of *testamenti factio*; they may be instituted or left legacies (*i.e.* the institution or legacy is not void), but they are incapacitated (in whole or part) from actually receiving the benefit so conferred, which becomes *caducum* (lapsed), and passes—

(*a*) To children or parents of the testator (if any) whom he has appointed heirs by his will; in default of these—

(*b*) To heirs or legatees (as the case may be) having children.

(*c*) In default of both classes, to the *fiscus*.

But if the legacy is joint (to A, B, and C), and one share lapses, the other legatees having children take before the heir. Under Caracalla, class (*b*) lost their claim, so that either heirs who were children or parents of the testator, or the *fiscus* took. The dis-

[1] *I.e.* persons who, though married, had no children living.

qualification imposed upon *coelibes* and *orbi* by the above *leges caducariae* was altogether obsolete in Justinian's time, having been abolished by Constantine.

As already stated, the right to benefit under a will belonged not only to citizens, but to those in the power of a citizen. If the superior were the testator himself, the person under *potestas* might acquire for his own benefit; *e.g.* a *filiusfamilias* made heir by his father, or a slave instituted heir with freedom.[1] If the superior were someone other than the testator, the benefit given to the person in *potestas* accrues in the ordinary course to the *paterfamilias* or master ;[2] *e.g.* A makes B's slave C his heir. This is a valid appointment if B has *testamenti factio* with A, and valid even though B is dead, for his *hereditas jacens* sustains his personality ; but of course when C enters upon A's *hereditas* at the command of B or B's heir it will be as agent for his master, who will thus get all the benefits accruing from heirship, and also incur all disadvantages.

(*c*) *Testamenti factio as meaning the capacity to witness a will.*—The capacity to witness a will was only required at the time of the making of the will, and in the time of Gaius only those persons could be witnesses who were capable of taking part in the mancipation upon which the will was founded. Since no person could participate in the ceremony who was not a citizen above the age of puberty and under no incapacity, it follows that persons who were deaf, dumb, insane, slaves, women, or children under *tutela*, were not good witnesses. Further, when Gaius wrote,

[1] Implied by the institution in Justinian's time.

[2] An exception would be the appointment of a *servus alienus cum liber erit*, the condition being fulfilled.

since in theory the whole business was between the testator and the *familiae emptor*, no person in the *potestas* of either of those persons, or under the same *potestas*, was a valid witness.[1] But the real heir, the legatees and their relatives were not excluded from being witnesses, though Gaius tells us that it is not desirable that the heir himself, his *paterfamilias*, and those subject to his *potestas* should be witnesses.[2] Under Justinian, though the will was no longer made by means of a fictitious sale, a witness had still to have *jus commercii* and be free from incapacity ; and Justinian tells us that neither women, children under puberty, slaves, dumb and deaf persons, insane persons, prodigals, nor persons declared *intestabiles*, were competent witnesses. The *familiae emptor* had, of course, disappeared, but, as under the old law, no person under the *potestas* of, or subject to the same *potestas* as, the testator, could be a witness ; and the custom of which Gaius disapproved, viz. that the heir and his relations were good witnesses, was abrogated by Justinian. Under his law, therefore, no person instituted heir, nor anyone in his *potestas*, nor his *paterfamilias*, nor his brother under the same *potestas*, could be a witness. Even under Justinian, however, legatees and *fideicommissarii* [3] could witness the will, though they benefited under it.

D. *How a will might be or become invalid.*

A will which was invalid *ab initio* was called *injustum* or *non jure factum* ; a will which, valid when made, was invalidated by some after event, was known as *ruptum*, or *irritum*.

[1] *Reprobatum est in ea re domesticum testimonium* (G. ii. 105).
[2] *Minime hoc jure uti debemus* (G. ii. 108).
[3] And, of course, their relatives.

Testamentum injustum.—A will might be void and ineffective from the moment it was made, because—

(*a*) The testator had not *testamenti factio*; *e.g.* was a *Latinus Junianus*.

(*b*) The will was improperly made; *e.g.* some of the witnesses were not lawful witnesses, or the testator failed to institute or disinherit a son in his *potestas*.

Testamentum ruptum.—A valid will might become void, because—

(*a*) The testator revoked it, which he could do by making a new will valid by *jus civile*; but Theodosius provided that even an invalid second will revoked the first, when the persons who would be heirs of the testator on intestacy were not instituted in the first but were in the second. The second will, though validly made, and so revoking the prior will, might, if the heir under it were only instituted heir to certain particular things, be construed as imposing a *fideicommissum* upon him, to restore the rest of the *hereditas* to the heir named in the earlier will; though if the particular things were not equal in value to a fourth of the *hereditas*, the heir instituted by the second will might keep, in addition to the things given him, such further part of the estate as would make up the fourth, which the *S.C. Pegasianum* secured him.[1] A will was also revoked after an enactment of Honorius by the lapse of ten years, but under Justinian mere lapse of time had no effect unless after ten years the testator showed his intention to revoke it, *e.g.* by oral declaration before three witnesses, or by a declaration registered in the *acta*. Mere intention to revoke was not enough, but it was a good

[1] Not the *lex Falcidia* as stated by Justinian (J. ii. 17. 3).

revocation if the will were destroyed, *e.g.* torn up, or the institution of the heir erased.

(*b*) A will was also *ruptum* by the agnation of a new *suus heres*, *e.g.* the birth of a *postumus suus*, or by a person becoming a *suus heres* after the date of the will in some other way, *e.g.* by marriage *in manum* or by adrogation; but, in the time of Justinian, a will was no longer necessarily broken by the birth of a *postumus*, because, as above stated, such persons might be instituted or disinherited by anticipation, and marriage *in manum* was obsolete; but Justinian tells us that even in his time, if a testator adrogated a person or took one in *adoptio plena*, his will was revoked by the agnation of a *suus heres*.

(*c*) A will became technically *irritum* when after the date of the will the testator suffered *capitis deminutio*. But—(i.) if the *capitis deminutio* was the result of the testator being taken captive by the enemy, his will was not *irritum*; for, as above stated, it was upheld either by the *jus postliminii* or the *fictio legis Corneliae*; and—(ii.) if the *capitis deminutio* were *minima*, and nevertheless the testator was a citizen and *sui juris* at death (*e.g.* having been adrogated had been afterwards emancipated), the praetor granted *bonorum possessio secundum tabulas* to the heir named in the will, which was, however, *sine re*[1] in the time of Gaius[2].

(*d*) Another instance of a will becoming *irritum* (or as it was here specially described, *destitutum* or *desertum*) was where, there being no substitute, the heir failed to take, *e.g.* died before the testator, or lost *testamenti factio*, or refused.

[1] *I.e.* the *bonorum possessor* could be ejected by the intestate heir.
[2] Buckland, p. 288. Cf. G. ii. 147-149.

(*e*) Finally, a will might become *ruptum* by a successful *querela inofficiosi testamenti*.

Subsect. 2. Intestate Succession

If a man died without a will, or left a will which failed to take effect, his heirs were ascertained by the provisions made by the law for the succession on intestacy, the guiding principle of the early law being that of *agnatio*, but this was gradually modified by the reforms of the praetors, by other changes prior to Justinian, and by Justinian himself, both prior to and by his *Novels*. The whole system of intestate succession was remodelled by Justinian in Novels 118 and 127. The subject, therefore, falls under the following heads :

A. Intestate succession under the *jus civile*.
B. The praetorian reforms.
C. The law prior to and as defined by Justinian's early legislation.
D. The *Novels*.
E. Succession to freedmen and *filii* (which requires separate treatment).

A. *Jus civile*.

As already stated, on a man's death intestate the first class of persons entitled to succeed to his *hereditas* were his *sui heredes*, *i.e.* those persons who were in his *potestas* at his death, and who by his death became *sui juris*. There was representation, *i.e.* children of a deceased *suus heres* took his place, and when such representation happened the succession was *per stirpes*, *i.e.* the children took between them the share their ancestor would have taken. An example will make this clearer. Balbus dies, leaving a son,

Maevius, whom he has given in adoption; another son, Stichus, whom he has emancipated; a daughter, Julia, who has married *in manum*; another son, Sempronius, who is married and has a son, Marcus; and two grandchildren by a deceased son, Gaius. Maevius, Stichus, and Julia were not in the power of Balbus at his death, Marcus was, but does not become *sui juris* on the death of Balbus; none of these persons, therefore, can be *sui heredes* of Balbus. Sempronius and the two grandchildren were, however, in the *potestas* of Balbus at his death and become *sui juris*; Sempronius is, accordingly, heir to half the estate, and the two grandchildren to the other half, representing their deceased father, and taking, *per stirpes*, his share. Had the representation been *per capita* instead of *per stirpes*, Sempronius and each of the grandchildren would have been heirs to a third of the estate.

Failing *sui heredes*, the *hereditas* went to the *agnati proximi*, *i.e.* those agnates (other than *sui heredes*) who were nearest in degree to the testator at the time of his death or at the time of the will failing, *e.g.* brothers born of the same father as the deceased,[1] or an uncle on the father's side. The rules in the case of agnates differ from those with regard to *sui heredes*, because—

(*a*) The nearest in degree exclude all other agnates, *i.e.* there is no representation, so that if Balbus died leaving no *sui heredes*, but Titius a brother and Maevius the son of another deceased brother, Titius

[1] Agnate brothers and sisters, *i.e.* brothers and sisters of the same father as the deceased, were the nearest in degree, and were specially known as *consanguinei*. Both *sui heredes* and *agnates* are sometimes described as *legitimi heredes*, because called to the *hereditas* by the law of the XII Tables.

is sole heir, as being nearer in degree, and excludes Maevius, who is more remote.

(*b*) In the case above given, Maevius has not even a contingent right of succession if Titius dies before entry, or refuses the *hereditas*, *nec in eo jure successio est*.[1]

(*c*) If there are several agnates of equal degree, the succession is *per capita* and not *per stirpes*; if, therefore, Balbus dies with no *sui heredes* and no brothers or sisters, but leaving Titius, the son of a deceased brother, and Marcus and Stichus, the sons of another deceased brother, Titius, Marcus, and Stichus will each be heirs to a third of the estate.

(*d*) The effect of the interpretation put by the older jurists (*veteres*) on the *lex Voconia* was to exclude all women save *consanguineae* from succession as *agnates*; therefore, an aunt or a niece had no claim.

Failing *sui heredes* and *agnati proximi*, the *hereditas* lapsed to the *gens*; but the right of the *gens* to succeed had become obsolete in the time of Gaius, and he does not discuss the topic in detail.[2]

B. *The praetorian reforms.*

Gaius[3] summarises the defects[4] of the civil law of intestate succession as follows:

(i.) Emancipated children had no claim, nor, as he might justly have added, had children who had been given in adoption or had married *in manum*.

(ii.) Children made citizens along with their father did not fall under his *potestas* unless the Emperor so decreed,[5] and were not, therefore, his *sui heredes*.

(iii.) Agnates who had suffered *capitis deminutio*

[1] G. iii. 12. [2] G. iii. 17. [3] G. iii. 18-24.
[4] Which may account for the dread a Roman had of dying intestate.
[5] Cf. G. i. 94.

were not admitted; because, although the *capitis deminutio* were *minima* only, the agnatic tie was dissolved.

(iv.) If the *agnati proximi* failed to take, the more remote had no claim.

(v.) No female agnates save *consanguineae* (sisters by the same father) could succeed, and—

(vi.) *Cognates* who were not agnates had no claim at all; so that persons tracing relationship through females were altogether excluded, and, therefore, a mother had no right of succession to her children (and *vice versa*) unless she had been married *in manum*, so as to become a quasi-sister by agnation to her own children.[1]

All these cases of injustice, Gaius says, the praetor amended by his edict, not in the sense of making the excluded persons heirs by *jus civile* (*nam praetor heredes facere non potest*), but by giving them *bonorum possessio ab intestato*. His principal reforms were as follows: he established a certain order, according to which *bonorum possessio* was granted, and gave the beneficial enjoyment of the estate to persons coming within the several classes, whether such persons were the legal heirs or those whom, being excluded by the civil law, he (the praetor) alone assisted. In so far as the grant was to the heirs by the *jus civile* it was, obviously, *juris civilis adjuvandi gratia*, in the other cases *supplendi gratia* or *corrigendi gratia*. The four principal grades or classes were *unde liberi*, *unde legitimi*, *unde cognati*, and *unde vir et uxor*.

[1] A further hardship was that while the natural claim of blood-relations was so largely disregarded, agnatic relationships could subsist between the deceased and an absolute stranger, *e.g.* a person whom he had adrogated, and who would, therefore, exclude a natural son who had been given his freedom.

Bonorum possessio unde liberi.—In this part of his edict[1] the praetor promised *bonorum possessio* not only to the *sui heredes* entitled by *jus civile*, but—(i.) to an emancipated *filiusfamilias*, and (ii.) a child who had been given in adoption and afterwards emancipated.[2] An emancipated *filiusfamilias* had, however, to make *collatio bonorum* with the other heirs, *i.e.* before sharing the estate with them, he had to bring into hotchpot (or the common fund) everything he had acquired since his emancipation except property acquired in the same way as *peculium castrense* and *quasi-castrense*. The reason is best seen by an example. A has three sons, B, C, and D. He emancipates B, and four years later dies. C and D become his *sui heredes*, and B is admitted to *bonorum possessio* with them by the praetor. But inasmuch as B may have acquired considerable property in the interval between his emancipation and his father's death, while C and D could acquire nothing save their *peculium castrense* and *quasi-castrense*,[3] B is only permitted to share on making *collatio bonorum*, as above described. If a son were emancipated, and his children born before the emancipation remained in the *potestas* of their *paterfamilias*, they became *sui heredes* of the latter to the exclusion of their own father by *jus civile*, but the praetor granted *bonorum possessio* to the father of half the estate and of the other half to his children. Of course, if there were several heirs, the father and the children each took not one half of the *hereditas*, but half of one share of it. An

[1] *Ea pars edicti unde liberi vocantur.*

[2] If a child given in adoption were emancipated after the death of his natural father, he lost, before Justinian, all right of succession both to his natural and adoptive father, save as a cognate to the former.

[3] They acquired everything else, of course, for their father.

emancipated child who afterwards gave himself in adrogation did not get *bonorum possessio* to his natural father unless the person adrogating him emancipated him in his father's lifetime. If an *emancipatus* died, his children left in the *potestas* of the grandfather were given *bonorum possessio* in this class.

Unde legitimi.—This species of *bonorum possessio* seems to have been solely *juris civilis adjuvandi gratia*, for it was only open to *sui heredes* by *jus civile*, who had failed to claim *unde liberi*,[1] and to the *agnati proximi*, as above defined. The praetor, it is true, helped agnates who were cut out at *jus civile*, but it was not in this degree but the next.

Unde cognati.—Failing a claim by persons entitled under the first two classes, the praetor gave *bonorum possessio unde cognati*[2] to the kindred in blood of the deceased. This class included all descendants whether emancipated or given in adoption or not, and although the child was still in the *potestas* of the adoptive father; agnates who had suffered *capitis deminutio*; more remote agnates excluded by the *agnati proximi*; women who were agnates (though not *consanguineae*) and other relatives, although the tie was only through women, so that a child could succeed to his mother, and *vice versa*. All these persons, of course, could not claim at once. The rule was that those who were nearest in blood to the deceased when the *bonorum possessio* came to this

[1] *I.e.* had neglected to claim *bonorum possessio* within a year, and so became obliged to fall back upon the second chance given them by the praetor, viz. to claim as *legitimi*.

[2] But cognates were only admitted to the sixth or, in the case of children of a second cousin (*sobrino sobrinave nati*), the seventh degree.

class,[1] shared equally, and there was no representation.

Unde vir et uxor.—If no grant were made under the above classes, *e.g.* because all entitled failed to claim, the praetor granted *bonorum possessio* to the deceased widow or widower, as the case might be.

C. *The law prior to and as defined by Justinian's early legislation.*

The changes in the law made prior to Justinian display a gradual recognition of the principle of *cognatio* at the expense of *agnatio*, a development which was finally completed by Justinian himself.

The *S.C. Tertullianum*, passed under Hadrian, gave a better position to a mother who, unless married *in manum*, had hitherto at best the right to *bonorum possessio* of the estate of her children in the third degree, *i.e. unde cognati*. If, being an *ingenua*, she had the *jus trium liberorum*, or, being a *libertina*, the *jus quattuor liberorum*, the mother acquired under the statute a civil law right to succeed to her children after their children (*liberi*), their father and their consanguineous brothers and sisters, the mother in the absence of such brothers sharing with the sisters, the mother taking a half. The mother's position was subsequently further improved. If, therefore, a child died leaving no issue, no father and no agnatic brother, the mother became the legal heir, though if the child left sisters the mother took half the estate. Conversely, the *S.C. Orphitianum*, 178 A.D., gave children a right of succession to their mother's estate. Hitherto children could only claim *bonorum possessio* to their mother *unde cognati*; the effect of the *S.C.* was to raise them to the first degree. There was a good deal

[1] *I.e.* not at the death of the deceased.

of intermediate legislation which it can serve no good purpose to set forth. Our next halting-place is the scheme of Justinian's *Novels*.

D. The *Novels*.

Justinian determined to simplify the whole scheme of intestate succession and to carry to a logical conclusion the reforms initiated by the praetors, by substituting the principle of blood-relationship for agnatic relationship in practically every case. His final reform, as defined in the 118th and 127th Novels, was as follows :

There are four classes of heirs on intestacy arranged in the following order :

1. In the first class come descendants, whether the deceased were a man or woman, and these descendants are determined by blood-relationship, save that a child taken in adoption counts as a natural child.[1] Descendants in the first degree, *i.e.* sons and daughters, take equally *per capita*, and they exclude their own issue. But if a descendant in the first degree dies before the intestate there is representation ; the descendant's children take, *per stirpes*, the share their parent would have taken had he survived. For example, A dies leaving a son B and a grandson by B, C. B excludes C. A dies leaving a son B and two grandchildren by a deceased son, C ; B takes half the estate and the grandchildren the other half *per stirpes*, as representing their deceased father.

2. The second class is solely determined by *cognatio*, and consists of ascendants, the nearer excluding the more remote.

3. Brothers and sisters of the whole blood, and the children of such brothers and sisters as had died before

[1] The last relic of the agnatic principle.

the intestate, the latter taking their parent's share *per stirpes*.

4. Brothers and sisters of the half blood, and children of such brothers and sisters as had died before the intestate, the children taking as above.

5. All other collaterals, according to nearness of degree, the praetorian restriction with regard to the sixth or seventh degree being abolished.

6. Husband or wife, by *bonorum possessio*, not by heirship, as in the other cases.

7. The *fiscus* took in the absence of claimants.

E. *Succession to* (*a*) *freedmen and* (*b*) *filii*.

(*a*) *Succession to freedmen*.—According to the XII Tables a slave properly freed, *i.e.* a *civis libertus*, had full power to dispose of his property by will, and might omit all mention of his patron, for the XII Tables only called the patron or his children to the inheritance if the *libertus* died intestate without leaving any *suus heres*. The praetor, in the event of the *libertus* dying leaving no children or if they had been disinherited, granted the patron *bonorum possessio* of half the estate. And if the *libertus* left no *sui heredes* at all and no will, the patron's civil law claim to the whole *hereditas* remained. The intermediate changes do not need notice. Justinian finally settled the rules as follows:

(i.) Natural descendants of the *libertus*.

(ii.) Patron.

(iii.) Patron's children.[1]

(iv.) Collateral relations of the patron to the fifth degree.[2]

[1] By a *S.C.* in the time of Claudius a *paterfamilias* might assign a freedman to one particular child (J. iii. 8).

[2] For a more detailed account of the succession to freedmen, see Roby, i. 270; Moyle, 5th ed. pp. 374-376.

Succession to Latini Juniani and dediticii.—Since a *Latinus Junianus* had not the right to make a will, his property passed on his death to his patron in any event, who took not *jure hereditario*, as in the case of a *libertus*, but *jure quodammodo peculii*.[1] Hence there were important differences between the patron's right to succeed to a *civis libertus* and to a *Latinus Junianus*. For example :

(i.) A *Latinus Junianus* had no possible *sui heredes*.

(ii.) The property of a *civis libertus* could in no case pass to his patron's *extranei heredes*, whereas the estate of a *Latinus* could so pass.[2]

(iii.) If there were two or more patrons, the property of a *civis libertus* belonged to them equally, although they may have owned him as a slave in unequal shares ; but co-patrons succeeded to the estates of *Latini Juniani* in the same shares in which they formerly owned him as a slave.[3]

The estates of *Dediticii* belonged in all cases to their patrons, who sometimes took as in the case of succession to *cives liberti* (*i.e.* where, if the slave had been of good character, he would have become on manumission a *libertus*), sometimes as in the case of succession to *Latini Juniani* (*i.e.* where, had the slave been of good character, he would have become a *Latinus*).[4]

(*b*) *Succession to a filiusfamilias.*—A *filius* might die either in his ancestor's power or be *sui juris* through emancipation.

[1] G. iii. 56.

[2] A *S.C. Largianum* gave the patron's children not expressly disinherited a preference over *extranei* in regard to the property of a *Latinus Junianus*.

[3] For further differences see G. iii. 60-67.

[4] G. iii. 74-76.

1. If the son died in *potestas*, his father, under the early law, took all his property as *peculium*. When the *peculium castrense* was introduced, the son could dispose of it by will after Hadrian, and under Justinian he could so dispose of his *peculium quasi-castrense* also; but if he died intestate, his father took both *peculia jure communi*, but it is not clear whether this means by way of inheritance or as *peculium*.[1] Justinian, however, postponed the right of the father in this respect to the son's children, and his brothers and sisters.[2] Of the *peculium profectitium* the son was unable to dispose, even in Justinian's time, and his father accordingly acquired it on his death in any event. Originally the father took the *peculium adventitium* also; but in Justinian's time the father succeeded to the *peculium profectitium* in any event, to the *peculium castrense* and *quasi-castrense* only if the son died intestate, and even then after the children and brothers and sisters of the *filius*; in the *peculium adventitium* he took a usufruct, and, failing children and brothers and sisters of the deceased, the *dominium* of the property.

2. If the son were emancipated he had full testamentary capacity; if he died intestate, his property belonged to his *sui heredes*, failing them to his actual manumitter (whether *parens* or *extraneus*),[3] unless there had been a *fiducia* in favour of the father. In the time of Justinian, however, a *fiducia* was implied in every emancipation,[4] and the order of succession was, first, the children of the deceased; then the father, subject, however, to certain rights in favour

[1] Buckland, p. 372.

[2] J. ii. 12. *pr.*

[3] *Vide supra.* Ten persons were preferred by the praetor to the *extraneus manumissor, illa parte edicti unde decem personae vocantur* (see Roby, i. 260).

[4] J. iii. 2. 8.

of the mother, brothers, and sisters (if any) of the deceased.[1]

Subsect. 3. Bonorum Possessio

Bonorum possessio, many of the details of which have been already described, was a universal succession under the praetorian Edict; for the *bonorum possessor* had, as such, no status in the eye of the law, though he was amply protected by the praetor. As already appears, *bonorum possessio* was granted on three grounds: it might be—

(i.) *Secundum tabulas*, *i.e.* where there was a will duly sealed as required by the Edict.

(ii.) *Contra tabulas*, *i.e.* where the praetor wholly or in part upset the will. A will (*e.g.*) would be wholly void where a *filius suus* was *praeteritus*, and such son could apply for *bonorum possessio*, or rely on his civil law claim by *hereditatis petitio*. An example of a will being partly upset would be where some person was *praeteritus* (other than a *filius suus*, *e.g.* an *emancipatus*) whom the praetor required to be instituted or disinherited, in which case the *praeteritus* could obtain *bonorum possessio*, but would be bound by some of the provisions of the will, *e.g.* the appointments of guardians.

(iii.) *Ab intestato*, when the *bonorum possessio* might either be granted to the civil law heir *adjuvandi gratia*, as affording him more effective remedies, or, *corrigendi gratia*, to some person whom the civil law excluded; *e.g.* an emancipated son, or a husband or wife. The chief cases of this have already been noted.

The formal application for possession of the property of the deceased was made by a petition to the

[1] See Moyle, p. 359.

praetor, and ascendants and descendants were allowed a year (*annus utilis*), all other persons 100 days (*centum dies utiles*), in which to make their application. By failure to make it in the time limited, they lost their right. The grant carried with it praetorian succession, which might be permanent (*cum re*) or temporary (*sine re*). It was *cum re* when the *bonorum possessor* was not liable to be ejected by a person with a better title; *e.g.* when he was the civil law heir as well, *sine re* when he was liable to ejectment. For example, Balbus, the *scriptus heres*, failing to demand *bonorum possessio*, it is granted to Titius, the intestate *heres*. The *bonorum possessio* will be *sine re* if the will was properly made, and fulfils all the requirements above mentioned, since Balbus can, by his civil law action (*hereditatis petitio*), evict Titius, whose possession was merely *juris civilis supplendi gratia*. On the other hand, possession granted to the *jus civile* heir, *juris civilis adjuvandi gratia*, or to some person to whom the praetor makes a grant in preference to the civil law heir [1] (*juris civilis corrigendi gratia*), is final, and therefore *cum re*. The remedies of a *bonorum possessor* were—

(*a*) The *interdictum quorum bonorum*, by means of which the right to corporeal property belonging to the estate could be enforced. It lay only against those who held the property *pro herede*, *i.e.* claimed to be heirs, or *pro possessore*, *i.e.* who advanced no title at all. Thus it did not lie against one who claimed it, *e.g.* under a sale. To succeed the *bonorum possessor* must show that his grant satisfies the terms of the edict, for the praetor when granting it did not go into the question as to whether the claimant was

[1] *I.e.* after the praetor's power in this respect was recognised.

entitled in all particulars. If he succeeded on the interdict this did not definitely settle the matter, but it gave him the benefit of possession, and put to the proof any claim brought against him.

(*b*) The *petitio hereditatis possessoria*, analogous to the *hereditatis petitio* of the civil law heir. It lay against the same persons, and with respect to the same rights in general as the *interdictum quorum bonorum*, but the judgment was not provisional but final. There were certain cases, however, in which the *interdict* would be preferred.

(*c*) An action against those holding property by some other title than inheritance or mere possession, and as against debtors, proceeding on the fiction that he was *heres*.[1]

In the case of the *bonorum possessor cum re* his position was impregnable, for he could defeat even the civil law heir, by the *exceptio doli*, but if the grant were *sine re*, he had no answer to the *hereditatis petitio* of the heir, and would have to surrender whatever he may have recovered by the above remedies. Both kinds of *bonorum possessores* could usucapt, but where it was *sine re* the possession might be interrupted, whereas if it were *cum re* this could not occur.

The origin of *bonorum possessio* is obscure. In its earliest form it was solely *juris civilis adjuvandi gratia*, viz. *secundum tabulas* to the *scriptus heres* under a proper will, or *ab intestato* to the *agnati proximi*. The most probable suggestion is, that inasmuch as a *suus heres* obtained possession *ipso jure*, while others, such as an *extraneus* (*scriptus*) *heres* and an agnate, could acquire undisputed possession only by the praetor's

[1] Conversely, the creditors of the estate were granted an action against the *bonorum possessor* on the same fiction.

decree,[1] *bonorum possessio* was first introduced where, there being no *suus heres*, there was a contest between the testamentary and intestate heirs. So that a grant of *bonorum possessio* not only settled the dispute but prevented any third person acquiring the *hereditas* by *usucapio pro herede*. Next, *bonorum possessio* became *juris civilis supplendi gratia*, being granted when a *scriptus heres* failed to apply for *bonorum possessio* in due time (though it might not, in this case, be lasting possession, since it was still open to the *scriptus heres* to bring a *petitio hereditatis*); finally the grant appeared *corrigendi gratia*; *i.e.* when, from Cicero's time onwards, the praetor promised it to persons not entitled in any sense by *jus civile*.

Subsect. 4. Addictio bonorum libertatis causa

This *addictio bonorum* was introduced by Marcus Aurelius, and the fact that it is not mentioned by Gaius helps us to fix the date of his *Institutes*.

If a man, by his will, gave freedom to some of his slaves, and the *hereditas* was refused by the heir under the will, the intestate heirs, and the *fiscus*, it would be adjudged to the creditors, who would sell it to satisfy their claims, and the gifts of freedom might, accordingly, fail. Marcus Aurelius provided that in such case the estate should, instead of being granted to the creditors, be adjudged (*addictio bonorum*) to any of the slaves to whom liberty had been given, on the application of such slave, he giving security that the creditors would be paid in full. The *addictio*

[1] The XII Tables provided that the *suus* was to be 'heir', failing him the *agnates* or *gens* are not made heirs, they are merely *to take* the estate, *familia* (see Sohm, pp. 531-534; Moyle, pp. 471-475).

bonorum was *libertatis causa*, because thereupon all the slaves, to whom freedom had been given directly, became free ; those slaves whom the heir was ordered to manumit being granted their freedom by the slave to whom the goods were adjudged. Marcus Aurelius further provided that, if the *addictio* could not take place because the *fiscus* accepted the inheritance, the slaves should nevertheless receive their freedom. The Emperor Gordian permitted the *addictio bonorum* to be made even to a stranger if he gave proper security.

Justinian points out that the rescript of Marcus Aurelius, which introduced the *addictio*, was not only beneficial to the slaves but to the deceased testator, for it saved him the disgrace of a sale of his goods after his death by his creditors ; and the Emperor adds that the rescript applies not only where there is a will giving liberty to slaves, but where the master dies intestate, having given liberty to slaves by a codicil, and the inheritance is refused by those entitled *ab intestato* ; and, further, that, in his judgment, the rescript must be taken to include even cases where the gifts of freedom were made by the master, *inter vivos*, or by a *donatio mortis causa*, so as to prevent any question as to whether creditors have been defrauded.[1] The grant could not be made until it was certain that no one would accept the inheritance, and a person under twenty-five was not bound either by his acceptance or rejection until that age.[2] If, therefore, A, the intestate heir, were aged twenty, no valid *addictio* could logically be made for five years ; but Justinian states that, even in that case, it might be granted,

[1] J. iii. 11. 6 ; *i.e.* under the *lex Aelia Sentia*.

[2] *I.e.* because the praetor might grant *in integrum restitutio*.

and that if A had declined the *hereditas* before twenty-five, the grant had been made and the slaves freed; then, even if he changed his mind at twenty-five, and applied for *in integrum restitutio*, thus rescinding the *addictio*, the gifts of liberty were still upheld.

The above four forms of universal succession were subsisting in the time of Justinian; those about to be mentioned were either obsolete or no longer had the same effect.

Subsect. 5. In jure cessio hereditatis [1]

This species of universal succession consisted of the transfer of the *hereditas* by the *heres* to a stranger by means of a fictitious lawsuit (*in jure cessio*), so as to make the stranger *heres* in place of the real heir.

The only kind of heir who could so transfer the *hereditas* was an agnatic heir (*legitimus heres*) on an intestacy, and then only before he made *aditio*. This was not strictly a breach of the rule, *semel heres semper heres*, because the *legitimus heres*, unlike the *suus*, was not heir at all until entry; what he transferred therefore was not his heirship but his right of entry. If such a person made *in jure cessio* after entry, though he validly transferred the corporeal property of the *hereditas*, he still remained *heres*, and liable to the creditors of the estate, while debts due to the estate were extinguished, and the deceased's debtors were the gainers.

If the *scriptus heres* (*extraneus*) in a will made *in jure cessio* before *aditio* nothing resulted (*nihil agit*), for his right to the *hereditas* was dependent on entry

[1] G. ii. 34-37; cf. iii. 85-87.

and was probably not, like that of the *legitimus*, regarded as an inchoate right conferred by the XII Tables. But the reason of the distinction is obscure.[1] If the *extraneus scriptus* made the transfer after entry, the result was the same as where the *legitimus heres* transferred after *aditio*.

With regard to a transfer by the *suus heres*, who was, of course, heir without *aditio*, there was a dispute between the two schools. The Sabinians held the transfer to be absolutely without effect; the Proculians thought that the effect was the same as where a *legitimus* or *extraneus* made a transfer after entry.

This kind of succession being obsolete in the time of Justinian he omits any notice of it.

Subsect. 6. (a) Bankruptcy. (b) Adrogation, marriage, and Coemptio. (c) The S.C. Claudianum

(*a*) *Bankruptcy*.—This subject will be discussed at length in the law relating to actions.[2]

(*b*) *Adrogation, marriage, and coemptio*, as modes of universal succession, have been dealt with already. In the time of Justinian marriage *in manum* and *coemptio fiduciae causa* were altogether obsolete, and adrogation no longer operated as universal succession, since it merely gave the adrogator the usufruct of the property of the person adrogated.

(*c*) *The S.C. Claudianum*.—This *miserabilis per universitatem adquisitio*, which took place when a free woman gave way to her passion for a slave, and forfeited her freedom and her estate at the same time to the slave's master, was abolished by Justinian.[3]

[1] Buckland, p. 398. [2] P. 446. [3] P. 56.

Section VI. The Law of Obligations

Obligations have already been mentioned as forming part of the estate which passes on a *successio per universitatem*; it remains to consider their nature and classification, how they arise, are transferred (other than by universal succession), and how they may be extinguished.

(1) *The nature of an obligation.*

Justinian defines an obligation as follows: *Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura* (J. iii. 13, *pr.*); *i.e.* as the legal tie between two persons which binds one or both of them to do or forbear from doing something for the benefit of the other. Let us look a little more closely at this very important conception. It requires (*a*) at least two persons, or there can be no question of tying together. These persons must be definite persons; *e.g.* A can be bound to B, but not to all the world. B may or may not also be bound to A. Thus if B lends A ten *aurei* (*mutuum*), A alone is bound, and the obligation is said to be *unilateral*; but if A agrees to sell B a horse for ten *aurei*, A is bound to hand over the horse and B to pay the ten *aurei*. Here the obligation is said to be *bilateral*. (*b*) The law for some sufficient reason (*causa*) ties the two parties together, so that one or both are bound to do or to forbear towards the other. Now if the relation be viewed from the standpoint of the party entitled to the act or forbearance, it is a benefit or advantage, whereas from the point of view of the party bound it is a burden. To-day the common use of the term obligation is in the sense of a burden

or duty, and it is this aspect of duty under the law which is stressed in early times, for the Romans talk, *e.g.*, of the duties of the buyer and seller, not of their rights. Yet it is the aspect of benefit, its money value to the person entitled, which makes it a *res*, that leads the Roman writers to treat of obligations in the second half of the *Jus quod ad res pertinet*. (*c*) The acts and forbearances must themselves be definite; *e.g.* A may be bound to serve B as a clerk, or to return a book he borrowed, or to pay compensation for loss inflicted on B by negligent or intentional harm done to his property, but A cannot contract to do whatever B may require: the relation is too indefinite. (*d*) As an obligation from the point of view of the party entitled is a *res*, it has a money value, for that as we have seen is the legal significance of the term *res*, but here the *res* is *incorporalis*, giving rise to a mere right to some act or forbearance against a definite person (*in personam*), instead of being one with respect to some corporeal object, whether one's own or another's, that can be asserted against all the world. (*e*) As the law has tied the parties together, the law requires that the act or forbearance due shall be rendered, in which case the *juris vinculum* is dissolved. If the render is refused, the law will enforce the obligation either specifically (but this is not usual), or substitutionally by the payment of damages.

The same obligation can only exist between the original parties to it: the law will not suffer either the benefit to be transferred or the burden. The reason is probably to be found in the fact that people in early societies can understand the transfer of ownership of some *res corporalis* by actual delivery, but cannot comprehend how it can be possible to

transfer what has in fact no objective existence. Means were found to evade these difficulties in later law. In the same way, if I employ an agent to buy a plough for me, in later law the plough becomes mine as soon as it is delivered to him, but if I employ him to enter into a contract to buy next year's cotton crop from B, the benefit of the contract is not automatically mine, but my agent must transfer to me the rights he has acquired. It follows from the personal nature of an obligation that death in early law must have ended it in all cases; though this was too inconvenient to stand in its entirety in later law. It continued, however, to be true of obligations arising out of civil wrongs, or delicts, so far as the wrong-doer was concerned, for the payment of the pecuniary penalty attached by law was in lieu of the early vengeance the injured party or his relatives could inflict, and such vengeance attached to the very body of the wrong-doer, and could not be carried beyond the grave.

(2) *The chief classifications of obligations.*

(*a*) Gaius in the *Institutes* gives only two heads—contract and delict. In another work he adds another head—*ex variis causarum figuris.*

(*b*) *Justinian* is naturally more elaborate than Gaius. His *summa divisio* (chief division) is into *civiles* and *honorariae* (civil and praetorian); his *sequens divisio*, which, in treatment, is really his main division, follows Gaius, being divided into contract, quasi-contract, delict, and quasi-delict, the second and fourth probably being what Gaius indicated by his *ex variis causarum figuris.*

A contract is an agreement enforceable at civil law, and Justinian mentions four classes of these arising

—*re*, *verbis*, *litteris*, and *consensu*. Agreements not enforceable by civil law are pacts, and where they are not actionable at all, they are *nuda pacta*, but they could always operate by way of defence. Certain pacts, however, were made actionable by the praetor or by Imperial constitutions, and were called *pacta vestita*. These are not noted in the *Institutes*, as they ought to be, among the sources of obligations.

A *quasi-contract* is primarily moral in character; it is not connected with agreement, nor yet with wrong; but the only way in which the law can do substantial justice between the parties is to provide a remedy as if there was a contract. Thus A under a mistake pays money to B which is not owing, though B in fact thinks it is; justice requires that B shall refund the money, and so the law imposes a duty on B to return it. Such cases, however, are strictly defined by law, and not all cases that come within the general principle noted above are treated as quasi-contracts. It is a question of expediency which each legal system must answer for itself.

A delict is a wrong independent of contract, and consists in the violation of a right *in rem* vested in the plaintiff in consequence of some act of the defendant; *e.g.* damage done to property wilfully or negligently. Its exact nature will be more fully considered hereafter.

Quasi-delicts are wrongs of a miscellaneous character, chiefly cases of vicarious liability; *i.e.* one person actually does a wrong, but on grounds of expediency another is made responsible for it; *e.g.* A throws something out of the window of a house occupied by B and adjoining the highway to the injury of a foot-passenger, C: the law holds B responsible to C for the damage.

This classification is not exhaustive, for, as noted above, *pacta vestita* and certain contracts called innominate contracts are excluded. There are more than four delicts, and such sources of obligations as judgment, magisterial order or breaches of contract are not mentioned. The classification is obviously artificial, for a preconceived classification arranged symmetrically in fours has been adopted, and the law squeezed into it with resulting violence to its contents. The heading of quasi-delict does not seem to be logically defensible.

(3) Other classifications are—

(*a*) *Civiles*, actionable at civil law, and *naturales* which, though not enforceable at law, might yet produce legal consequences indirectly. Like quasi-contract these constitute the importation of moral notions into the law, without going the whole length of converting them into enforceable obligations. They rest upon no general principle, nor do they all produce the same legal effects, but are, in the interests of expediency, given such legal effect as justice seems to require. The chief occasions seem to be some defect of capacity, as in the contract of a slave, or such relationship between the parties as could not give rise to a civil obligation between them, *e.g. paterfamilias* and *filiusfamilias*, or some rule of law that prevented a civil obligation from arising in the circumstances; *e.g.* a loan to *filiusfamilias* after the *S.C. Macedonianum* resulted, generally, in a natural obligation merely. Only one certain legal effect can be postulated for a *naturalis obligatio*; it barred the *condictio indebiti*. The other possible consequences cannot be catalogued, but include in some cases the possibility of novation, the provision of a sufficient

basis for suretyship, and the conversion of the natural obligation into one civilly enforceable. The conception of a natural obligation is of no particular consequence from the point of view of its legal effects so far as the law student is concerned, but viewed from the standpoint of legal development it throws light on the fairly constant relation between law and morality which is such a prominent feature of Roman law.[1]

(*b*) *Obligationes civiles* are those actionable at civil law, while *obligationes honorariae* are those actionable under the edicts of the praetor or other magistrates.

(*c*) *Unilateral obligations* bound one party alone, as in the case of certain contracts, *e.g.* a loan for consumption, or a formal verbal promise (stipulation), and in the case of all delicts; *bilateral* obligations, like a contract of sale, bound both parties. Some contracts, though ordinarily giving rise to liabilities on one side, but which might exceptionally give rise to liabilities on both sides, are said to be *imperfectly bilateral*; *e.g.* the loan of a gun binds the borrower to return it, but if the lender makes over a weapon which he knows to be unsafe without disclosing that fact, he will be liable for damage caused in consequence.

(*d*) If A borrows money from B and C guarantees repayment of the loan, C's contract of suretyship is said to be *accessory* to the *principal* contract of loan.

Subsect. 1. Obligations arising from Contract

The Roman, like the English contract, is an agreement which creates an obligation enforceable by civil law. The minds of the parties must be at one. Usually one party makes an offer which the other

[1] See Buckland, p. 518.

accepts; such offer and acceptance must be contemporaneous. Fundamental mistake would exclude a genuine agreement, and, in the case of *stricti juris* contracts, *i.e.* those depending originally on the form in which the contract was entered into, fraud (*dolus*), unless fundamental, did not vitiate the agreement, though in *bonae-fidei* contracts, those depending on good faith, the judge gave relief. Later Aquilius Gallus introduced the *exceptio doli* where the contract was *stricti juris*. *Metus*, or the threat of grave bodily harm to the party himself or his family, had the same effect as *dolus* at civil law in the case of contracts *stricti juris*, till the praetor granted relief, but *bonae-fidei* contracts were probably avoided.

The contracting parties must have the necessary capacity under the law; the disabilities of several classes have already been noted—slaves, *pupilli*, women in *tutela*, *furiosi*, *prodigi interdicti*, *peregrini* in certain cases, persons *in mancipii causa*, and the like. Finally the purpose of the agreement must be both lawful and possible. But mere agreement does not in Roman law by itself constitute a contract, but merely a *pactum*, which is said to be *nudum* since it is not enforceable by action; the law must annex to it the force of an obligation by reason of some *causa* or reason indicated by some characteristic of the agreement which the law regards as sufficient. Perhaps such *causae* were in origin regarded as sufficient reasons for the law to add binding force to the agreement, so that a contract is a declaration of *consensus* that results in an obligation actionable by civil law, rather than one intended to create such an obligation.

There were four *causae* by reason of which an

agreement was regarded as producing an actionable obligation—

(i.) *Re.*
(ii.) *Verbis.*
(iii.) *Litteris*, or
(iv.) *Consensu.*

(i.) Contracts made 're'.

The essence of the contracts made *re*, or, as they are called, *the real contracts*, was that, at the time the agreement was made, one party, by delivering something belonging to him to the other party to the contract, imposed on that other an obligation to return the thing itself or, in the case of things intended to be consumed, an equivalent in kind. As the Roman lawyers expressed it, the contractual obligation was created by something being handed over—*ex re tradita initium obligationi praebet.* Justinian tells us that there were four classes of real contracts—

(A) *Mutuum* or loan for consumption.[1]

(B) *Commodatum* or loan for use.

(C) *Depositum*, *e.g.* A gives B his watch for safe custody.

(D) *Pignus*, pledge or mortgage.

The first was of civil law origin, while the remaining three were praetorian.

Before discussing these, an older form of real contract requires notice, viz. the *nexum*, which had long been obsolete in the time of Justinian, and which had, for all practical purposes, fallen into disuse in the time of Gaius, who only refers to it in connection with the means of discharging an obligation

[1] This is the only real contract described by Gaius, but the others were known in his time as legal transactions, and he frequently refers to them.

so created (*nexi liberatio*).[1] The exact nature of the transaction is not known.[2]

The *nexum*, like the *mancipatio*, was a proceeding per *aes et libram*, but whereas the *mancipatio* was a sale, the *nexum* was probably a money loan. The lender and borrower get together five Roman citizens above the age of puberty and a *libripens*. The lender puts into the scales the metal to be lent,[3] and this the *libripens* weighs out and hands over to the borrower, while the lender declares that the borrower has become his debtor (*dare damnas esto*). Thereupon the debtor was regarded as *nexus* to his creditor, *i.e.* bound in his own person to the creditor until the loan was repaid; so that, just as in the case of a judgment debtor, the creditor could enforce payment by *manus injectio* (execution on the body of the debtor), and make the debtor a slave in satisfaction of the debt. The introduction of coined money had the same effect here as in the case of the *mancipatio*; the metal was no longer weighed out, the money loan being paid directly by the lender to the borrower; but the formal part of the *nexum* was retained, the borrower striking the scales with a single coin, and the formality continued to confer upon the lender the right to subject the debtor to *manus injectio*.[4] The *nexum*, however, must have fallen into disuse when a *lex Poetelia* of uncertain date[5] mitigated the severity of its remedy by restricting the power of the creditor to impose inhuman

[1] G. iii. 173. [2] Buckland, pp. 426-427.

[3] For, like the earliest form of *mancipatio*, the *nexum* dates back to the time when there was no coined money.

[4] Which, of course, accounts for the survival of the *nexum* after coined money had been introduced, when there was no actual need to weigh out the metal.

[5] For suggested dates see Girard, 8th ed. p. 514.

treatment on his debtor like the use of stripes and fetters. This led, towards the end of the Republic, to the adoption of the alternative of execution on the borrower's goods for execution on his person, and in the time of the classical jurists a money loan would ordinarily be made by means of the *mutuum* fortified at first by a stipulation (a solemn promise to return the money lent), and later by a *mutuum* alone, the first of the real contracts Justinian describes.[1]

A. The *mutuum* was a loan of *res fungibiles* (*e.g.* money, wine, or grain) for consumption. Necessarily, therefore, the borrower became *dominus* or owner,[2] and his obligation was to restore not the thing lent but its equivalent in value. It was the only *stricti juris* contract in this group.[3] The borrower was, by virtue of the contract itself, only bound to return the exact equivalent of what he received, without interest, even though he was in default (*mora*), *i.e.* had failed to repay at the proper time. The only means of securing interest was to get the borrower to promise it by a separate contract, the verbal contract known as *stipulatio*.[4] Finally, the remedy of the lender was the most stringent under the classical law,

[1] On the whole subject see Roby, ii. 296-310; Sohm, 3rd ed. pp. 52 and 372.

[2] *Unde etiam mutuum appellatum sit, quia ita a me tibi datur, ut ex meo tuum fiat* (J. iii. 14. *pr.*).

[3] A *negotium stricti juris* was one where the liability of the parties was measured exactly by the strict letter of the contract or other transaction, the consideration of equitable defences, *e.g.* fraud, being expressly excluded unless raised in the action by an *exceptio* in the formula, as opposed to a contract *bonae fidei* (*e.g.* the consensual contracts), where 'equities' could be taken into account by the *judex* without any express *exceptio*.

[4] P. 299 *et seq.*

viz. the *condictio certae pecuniae* for money or *triticaria* for other things, by means of which not only could the value of the things lent be recovered, but an additional third by way of penalty, if the loan was of money.

It only remains to notice that the *S.C. Macedonianum*,[1] passed under Vespasian, restricted the grant of an action to those who made money loans to a *filiusfamilias*; after that statute, accordingly, when a *filius* was sued on such a loan he could defeat the action by pleading the *exceptio S.C. Macedoniani*.

The *S.C.* had no application where the creditor was the victim of fraud or honestly mistaken as to the status of the debtor, who was by general repute a *paterfamilias*; nor where the *filius* had *peculium castrense* or *quasi-castrense*, to the extent of such *peculium*; nor where though promised to a *filiusfamilias* it was not actually lent till after he became *sui juris*; nor if promised while he was a *paterfamilias*, though he subsequently became a *filiusfamilias*, *e.g.* by adrogation. The consent of the *paterfamilias*, or that the loan was for his use, excluded the *S.C.* Though no civil obligation arose there was a *naturalis obligatio*:[2] the *filiusfamilias* and his sureties, if any, were under a natural obligation to repay the loan.[2]

B. *Commodatum* was the loan of a thing for some specified use (*e.g.* a horse for a day's riding). The essence of the transaction was that it should be gratuitous, *i.e.* that the lender (*commodator*) received

[1] Enacted on the ground of public policy, and named, it is supposed, after a notorious moneylender whose unconscionable transactions led to its enactment.

[2] Buckland, pp. 462-463.

no reward for the loan, otherwise the contract would not be governed by the rules of *commodatum* but by those of *locatio-conductio rei* (hire), one of the consensual contracts. The borrower (*commodatarius*), so far from acquiring *dominium* of the thing, did not get juristic possession ; he had merely *de facto* possession, *detentio*. Hence an important difference between the liability of the person who received a loan by way of *mutuum* and the *commodatarius*. The former being *dominus* was liable (on the maxim, *res perit domino*) to return the equivalent in value, even though what was lent for consumption was destroyed by pure accident (*e.g.* fire or shipwreck) ; the *commodatarius*, on the other hand, though bound to show *exacta diligentia* (*i.e.* the care of a *bonus paterfamilias*), was not liable for accident not arising from any fault on his part.[1] The lender could enforce his rights against the borrower by the *actio commodati directa* ; these rights were—

(i.) To have the thing itself returned with its fruits and accessories, if any, when the time for which it was lent had expired ; and

(ii.) That the borrower should display *exacta diligentia*, especially that he should keep the thing in fair repair, and not use it for any purpose other than that specified. If the *commodatarius* did so use it he committed theft—(*furtum usus*).

If the thing were stolen, the borrower, not the owner, had the *actio furti*, as he was responsible for the *custodia*. Under Justinian the choice was with the *dominus*, who could either rely on the *actio com-*

[1] But if the *commodatarius* took the thing lent on a journey, and lost it through robbery or shipwreck, he was liable (J. iii. 14. 2), because he had no right to risk taking the object away from home.

modati against the borrower, or the *actio furti* against the thief.

The borrower had the *actio commodati contraria* against the *commodator* if—

(i.) He had of necessity been put to extraordinary expense in relation to the thing lent.

(ii.) If through the wilful wrong (*dolus*) or gross negligence (*culpa lata*) of the *commodator* the thing lent injured the *commodatarius* (*e.g.* was infected to the knowledge of the *commodator* and communicated the disease to the borrower). The actions (*directa* and *contraria*) were *bonae-fidei* actions, for the contract (like all the real contracts, save the *mutuum*) was a *negotium bonae-fidei*.

(iii.) If he was not allowed to enjoy the thing as agreed.

C. *Depositum* was where one man, not necessarily the owner, entrusted to another some *res mobilis* for safe custody, the latter, as in *commodatum*, getting merely *detentio* of the object. As in *commodatum* the contract had to be gratuitous, *i.e.* the depositary must receive no payment, otherwise the transaction became *locatio-conductio operis*. The *depositor* had the *actio depositi directa* to enforce the return of the object, with its accessories and fruits, on demand ;[1] and also if the depositary was guilty of *dolus* or *culpa lata* in relation to the contract. The depositary who used the thing left with him was guilty of *furtum usus* unless he acted *bona fide*, when he was bound to restore all profit which had accrued from the use. The depositary had the *actio depositi contraria*—(i.) if the depositor failed

[1] A depositary who, having refused to give up the thing, was condemned in the *actio depositi directa* incurred *infamia*.

to display *exacta diligentia*, *e.g.* made a deposit of something with a latent defect causing damage to the depositary; (ii.) to recover *any* expenses he might be put to in keeping the thing. As he was not responsible for *custodia* he could not bring the *actio furti*.

The following were three exceptional cases of *depositum*:

(*a*) *Depositum miserabile* was where the deposit was made under urgent necessity, *e.g.* by reason of a fire or shipwreck. Here the depositary who denied the deposit or failed to show due diligence was liable in double damages.

(*b*) *Depositum irregulare* was where a *res fungibilis* (usually money) was entrusted by one man to another, usually a banker, on the understanding that the depositary was to become owner, and was only to be bound to restore its equivalent in value. In this case the depositary, becoming *dominus*, was liable even for loss by mere accident, but the transaction differed from *mutuum* because—(i.) it was chiefly in the interest of the depositor, though the depositary had the right to use the money; (ii.) interest could be claimed by the *actio depositi directa*, which was *bonae fidei*, whereas in the case of a loan by *mutuum*, interest was, as above stated, never recoverable in the absence of an express stipulation.

(*c*) *Deposit with a sequester* by several persons jointly has been already mentioned as one of the exceptional cases where a person with a mere derivative title under a contract acquired juristic possession with the possessory interdicts. It applied to land as well as movables, the purpose of the transaction being that the *sequester* should hold possession till some dispute or lawsuit concerning it was settled, when it was to

be returned to the party in whose favour the decision was given.

D. *Pignus.*—This contract, which resulted in a mortgage, has been already described. The creditor obtained, in Justinian's time, either possession of (*pignus*) or a right of sale over (*hypotheca*) some specific piece of his debtor's property, and was therefore entitled to a *jus in re aliena.*

It has been conjectured that *commodatum* and *depositum* developed out of the *mancipatio cum fiducia cum amico* mentioned by Gaius, while *pignus* certainly developed out of *fiducia cum creditore.* That *mutuum* had a different origin from the other three real contracts is pretty clear, having regard to the circumstance that it is unilateral and *stricti juris*, while the others are imperfectly bilateral and *bonae fidei* because of the *fiducia.*

(ii.) Contracts made 'verbis'.

The real contracts of Roman law may be compared with the simple contracts of English law, since they did not, in any sense, derive their efficacy from their form. The verbal and literal contracts, on the other hand, are more akin to the English formal contract under seal; they were enforced solely by reason of the form in which they were expressed. Of verbal contracts there were four kinds:

(i.) *Dotis dictio.*[1]

(ii.) *Jurata promissio liberti.*

(iii.) *Votum* or promise in favour of some religious foundation; and lastly, by far the most important,

(iv.) The stipulation.

[1] This and the next verbal contract have been described already; see pp. 105 and 71.

The origin of the stipulation has been variously conjectured. According to high authority it can be traced to the procedural undertakings given by litigants,[1] a view that is supported by the order in which stipulations are classified, the procedural coming first. This is in accordance with the well-known tendency of Roman writers to adopt the historical order in classification and explication. Sir Henry Maine's theory that it is the verbal remnant of the contract of *nexum* is generally discredited.[2] Muirhead's view is that it originated in a Greek practice of calling the gods to witness the performance of a promise between the parties, which was introduced into Rome and made actionable by the *lex Silia*, because the *lex Poetelia* had robbed *manus injectio*, in his view the only remedy upon a *nexum*, of its advantages, hence loans were made by handing over the money followed by a solemn promise for its return (the stipulation).[3] Girard doubts this explanation.[4] Others think it originated in religious practice, an oath sworn at the altar, perhaps of Hercules, which subsequently received legal recognition. At any rate it seems to have been applied in the first instance to promises to pay *certa pecunia* with its remedy the *condictio certae pecuniae* giving a penalty of one-third. Before or by the *lex Calpurnia* it was extended to promises of *certa res* giving the *condictio triticaria* (but without the penal *sponsio*), next to *incerta*, and finally to acts, giving rise to the general *actio ex stipulatu*.

Though the earliest form of a stipulation was for

[1] Buckland, p. 431.
[2] Ancient Law, p. 339, and Pollock's note, p. 374.
[3] Muirhead, pp. 204-212. [4] Girard, p. 522.

the payment of a certain sum of money, the beginner may find some difficulty in grasping why a person should so bind himself. The reason is that in its earliest application a promise was given in solemn form to repay a loan of money actually made at the time ; for though in later law a loan of money would of itself create an obligation, this was not so at first. Stipulation was probably not so much in use as an original contract. Of course it might be so employed occasionally, for provided the promise for payment were made in the required form it was binding though no loan might have been made. But it was mainly employed by way of ' novation ' (*infra*, p. 303) to extinguish some existing obligation and to substitute a new one with a better remedy. Thus if A sells a slave to B for 10 *aurei*, it may be that the slave has defects which by law A is bound to disclose but he has not done so ; if A were content to allow the transaction to stand on the footing of sale he might be obliged to take the slave back and return the price, or to accept a diminished price, so he stipulates for the payment of the price, and if B promises, the price is not now due upon the sale but on the stipulation, which is a contract *stricti juris*, binding solely in virtue of its form, and B could not raise the defence of fraud, though this became possible after the time of Aquilius Gallus, a contemporary of Cicero.

A. *The nature and form of a stipulation.*— A stipulation may be defined as that species of contract which imposes an obligation upon a person because he has answered in set terms a formal question put to him by the promisee, which contains a statement of the subject matter of the promise. It was unilateral and *stricti juris*. An example makes this clearer.

Titius means to promise to give Maevius his slave Stichus. If he merely says to Maevius, 'I promise to give you Stichus', there is no contract. For a proper stipulation Maevius must ask Titius, '*Spondesne mihi hominem Stichum dare?*' and Titius must answer, '*Spondeo*'.[1] Originally the question could only be put and answered by means of the particular words, *Spondes? Spondeo*; any other words, though they might express exactly the same meaning, were useless to create the obligation; but in the time of Gaius, *Dabisne? Dabo*; *Promittisne? Promitto*; *Fidejubesne? Fidejubeo*, and the like, even though expressed in Greek, were valid, though the form *Spondesne? Spondeo* was still regarded as peculiar to Roman citizens. Leo enacted (A.D. 472) that a stipulation should be valid even though the question and answer were not couched in the ancient solemn terms (*solemnia verba*), and in Justinian's time, therefore, provided the answer agreed with the question, the stipulation might be in any words and in any language.[2] If the subject matter of a stipulation were reduced to writing, it became established, as early as the third century A.D., that this raised a presumption that the promise was the result of a proper stipulation by question and answer, though under Justinian this could be rebutted by proving, *e.g.*, that what the parties had written out was a mere informal understanding, *i.e.* a *pactum*.[3] The parties had still to be present, but Justinian provided that where the stipula-

[1] It will be observed that the obligation in a verbal contract is unilateral, *i.e.* only one side (Titius) is bound. A contract is bilateral where both parties are bound, *e.g.* in sale (*emptio-venditio*) the vendor is bound to transfer the thing bought, the purchaser to pay the price.

[2] J. iii. 15. 1.

[3] J. iii. 19. 17.

tion was reduced to writing (*cautio*) alleging such presence, this raised a presumption which could only be rebutted by certain proof that one of the parties was absent throughout the day in question from the alleged place. Stipulations were a means of creating every sort of obligation—to pay money, to give property, to do or not to do an act, and to extinguish an existing obligation created in some other way and substitute another for it (novation); the reason for this last-mentioned use of stipulation being that the remedy on a stipulation (*condictio certae pecuniae* with its penalty of one-third) was a more stringent one than that on any contract save the *mutuum* and the literal contracts (where the remedy was the same). Novation implies the extinction of a former obligation and the substitution of a new one. A, *e.g.*, owes B ten *aurei* on a contract of sale (*emptio venditio*). The obligation to pay can be novated if B asks A, '*Spondesne mihi decem aureos dare?*' and A answers '*Spondeo*'; whereupon B obtains a better remedy to enforce payment, and, as a matter of evidence, need only prove that the stipulation was made; *i.e.* he is not forced, if A questions it, to prove that the sale really took place. A novation may even involve a change of parties: A, *e.g.*, owes B ten *aurei*, C engages to pay the money, and B agrees to accept C as his debtor. B asks C if he will pay the ten *aurei* owed by A, and C engages to pay it (*expromissio*); whereupon A's old obligation to pay is extinguished, being replaced by the new obligation imposed on C. C is not likely to promise to pay unless he owes money to A; in this, the usual case, A is substituting his debtor C to pay his own creditor, a case of *delegatio debitoris*, which is an *expromissio* in the stricter sense of that term.

A stipulation might be made simply (*pure*), or with a time named for performance (*ex die*), or conditionally. If made simply, 'Do you promise to give me five *aurei*?' the obligation to pay the money and the right of the creditor to demand it arose at once. If made *ex die*, *e.g.* 'Do you promise to give me five *aurei* on the Ides of March?' the obligation to perform on the day named arose at once, but the creditor could not demand it until the day arrived, and the whole of the day was allowed for payment.[1] A stipulation, 'Do you promise to give me five *aurei* every year as long as I live?' was construed as being made simply;[2] it had nothing to do with the rule *ad diem deberi non potest*, as the Institutes state.[2] That rule means that one cannot owe a thing up to a certain time and not thereafter, *e.g.* 'Do you promise to pay me ten *aurei* until the kalends of July?' The stipulation was construed as free from the limitation, but if action were brought thereafter it could be met by the *exceptio doli*. But a promise to pay 10 *aurei* each year during the life of either was unconditional and perpetual; if however, an action was brought after death, it could be defeated by the *exceptio doli*. A stipulation made subject to a suspensive condition (*e.g.* 'Do you promise to give me five *aurei* if Titius is made consul?')[3] did not give rise to an actionable obligation, but only to a hope (*spes*) that the promise would become effective by the condition being fulfilled; but this hope passed to the heirs of the promisee if the

[1] J. iii. 15. 2.

[2] J. iii. 15. 3.

[3] If the condition were negative, *e.g.* 'if I do not go up to the Capitol', it could not be definitely ascertained until death, and Justinian says that a promise based on such a condition was the same as a promise to perform at death (J. iii. 15. 4).

condition was not satisfied until after his death.[1] If a condition related to some event which had taken place, *e.g.* 'if Maevius is dead', but which was unknown to the parties, it did not delay the formation of the obligation; the stipulation in such case amounted to a kind of bet. If Maevius were alive the stipulation was void, otherwise the stipulation became at once effective. Where a stipulation was, not that a definite thing should be given or payment made, but for some act (*e.g.* to teach Greek) or forbearance (*e.g.* not to go to Rome), it was usual to add a penalty, *i.e.* to fix a sum as liquidated damages;[2] *e.g.*, 'Do you promise to go to Rome?' 'I promise'; 'And if you do not go do you promise to pay me ten *aurei*?' 'I promise.'[3] This practice not only had the advantage of making it unnecessary for the plaintiff to prove the value to him of the promise, it also enabled him to sue by *condictio certae pecuniae* instead of *ex stipulatu*.[4]

Justinian tells us that stipulations were classified as either judicial, praetorian, conventional, or common; *i.e.* both praetorian and judicial. Judicial, praetorian, and common stipulations are instances of stipulations made under compulsion in connection with legal proceedings; if judicial, on the authority of a judge (*judex*); if praetorian, on the authority of the praetor;

[1] It was otherwise in the case of a legacy given on a suspensive condition.

[2] There was no rule in Roman law by which liquidated damages could, as in England, be treated as an unfair penalty, and so reduced by the Court.

[3] There is ground for the view that originally stipulation only applied in the case of a promise to pay a definite sum of money, and, therefore, that when it had for its object anything other than a money payment, the promise had to be made conditional on a money penalty.

[4] P. 311.

if common, on the authority sometimes of the praetor, sometimes of the judge; and all three kinds are analogous to the English practice of requiring persons to 'enter into recognisances', *e.g.* to keep the peace, or to appear before the Court for judgment.

The examples given by Justinian of judicial stipulations are—

(*a*) The *cautio de dolo*, by which a defendant who was ordered to restore to the plaintiff some of the property of the latter, was obliged to undertake that he would yield it up without fraud, *i.e.* do nothing before delivery to lessen its value.

(*b*) The *cautio de persequendo servo qui in fuga est, restituendove pretio* was entered into by a defendant who had been given possession of the plaintiff's slave prior to the slave's escape, and the object of the *cautio* or stipulation was that the defendant should follow and reclaim the slave from any third party, or pay to the plaintiff the slave's value.

The examples given of the praetorian stipulations [1] are—

(*a*) The *cautio damni infecti*, by which a man whose property was likely to injure a neighbour by reason of its dangerous condition was compelled to give security to indemnify his neighbour against any ensuing damage; if the *cautio* were not duly entered into the praetor might give possession of the property to the person whom it seemed likely to injure, which, after an interval, might become permanent if the owner of the dangerous property continued recalcitrant.

(*b*) The *cautio legatorum* was that which the heir was compelled to enter into when a legacy was not at

[1] These comprise stipulations which the aediles imposed (J. iii. 18. 2).

once payable, *e.g.* had been given conditionally ; the legatee being entitled to have its future payment duly secured by the promise not only of the heir but of sureties. If the security were not forthcoming the legatee could claim possession of the legacy at once.

Justinian's examples of common stipulations are—

(*a*) *Rem salvam fore pupilli*, which was sometimes taken by the praetor and sometimes by the *judex*, to ensure the safety of the property of a *pupillus*.

(*b*) *Rem ratam haberi*, which was the stipulation entered into by an agent (*procurator*) who was conducting a lawsuit for another undertaking that the principal would ratify the agent's acts.

Finally, conventional stipulations were those not imposed by the praetor or *judex*, but entered into by agreement of the parties. Of these, the common form of stipulation, sufficient examples have been given.

B. *Invalid stipulations* (*Inutiles stipulationes*).[1]— A stipulation was void in the following cases :

(i.) If impossible *ab initio*, *e.g.* to give a slave Stichus, who was dead ; a hippocentaur, which cannot exist ; a thing which is *divini juris* or otherwise *extra commercium* ; a freeman wrongly considered a slave ; [2] or something which already belonged to the promisee. And if void *ab initio* the stipulation cannot become valid, because its object subsequently becomes possible,[2] *e.g.* the freeman becomes the slave of the *promissor*. Conversely, although the stipulation was originally possible it is avoided by subsequent impossibility,

[1] G. iii. 97-109, 117, 119 ; J. iii. 19.

[2] Even if the stipulation was in the form, 'Do you promise to give Titius (a freeman) when he shall become a slave?' it was void: *quod initio vitiosum est, non potest tractu temporis convalescere.* So too a promise to give a man his own after-acquired property was void (J. iii. 19. 22).

unless the impossibility is attributable to the fault of the *promissor*.

(ii.) If A promised B that C should do something for B's benefit the stipulation was in strict law void, for a third party can acquire neither rights nor duties, the limits of the contractual obligation being confined to the actual contracting parties: *res inter alios acta aliis neque nocere neque prodesse potest*; but, exceptionally, A would be liable—(*α*) if his promise was construed as an undertaking that he would be personally responsible that C should do the act; (*β*) if A's promise was that if C did not perform the act A would pay a penalty; and C might be liable—(*α*) in certain cases by an *actio adjectitiae qualitatis*;[1] (*β*) under Justinian's law if he were A's heir.

(iii.) Another consequence of the last-mentioned maxim was that a promise made by A to B that he would benefit C was void, but, exceptionally, B could enforce the promise—(*α*) if B had an interest in the performance, *e.g.* C was his creditor;[2] and (*β*) if A engaged either to do the act or pay a penalty. So also C might exceptionally enforce A's promise, *e.g.* (*α*) if he were B's *paterfamilias* or *dominus*; (*β*) if, under Justinian, the promise was in favour of B's heir, and C filled that position; and (*γ*) if B had taken the stipulation with reference to the property of C (his ward), C might have an *actio utilis*.[3]

(iv.) In the case of a stipulation *mihi aut Seio dare spondes?* the stipulator alone had the right to sue, but payment might be lawfully made to Seius even against the stipulator's will, and the obligation of

[1] P. 341. [2] J. iii. 19. 20.

[3] Conversely, an *actio utilis* might be granted against a pupil on attaining puberty on a contract made by his guardian.

the debtor thereby ceased, while the stipulator could recover from Seius by an *actio mandati*.

(v.) A stipulation *mihi et Seio*, Seius being the *paterfamilias* or *dominus* of the promisee, was for the benefit of Seius; if Seius were a stranger there was a dispute between the schools; the Sabinians held that the whole was due to the stipulator, the Proculians that he was entitled to half only, the stipulation being void as to the other half. Justinian confirmed the latter view.

(vi.) A stipulation was void where the parties were not in exact agreement in the question and answer; but if the stipulation was for quantities a promise for a less quantity was binding, as Ulpian tells us; *e.g.*, (*a*) 'Do you promise ten aurei?' 'I promise five *aurei*.'

(vii.) A stipulation taken by a *paterfamilias* or a *dominus* from his *filius* or *servus*[1] was not actionable, but gave rise to a natural obligation.

(viii.) Persons dumb, quite deaf, or mad (*furiosi*) could not be parties to a stipulation, and a pupil could not bind himself by a stipulation without his tutor's authority, nor even with such authority if an *infans*,[2] *i.e.* under seven years of age; a pupil, however, who was over seven years could be the promisee in a stipulation without his tutor's authority, because it was for his benefit. So long as the status of *in mancipii causa* and that of *in manu* lasted, persons in those

[1] A stipulation between a *filius* and a third party, however, gave rise to a civil obligation; if between a slave and a third person the obligation was still *naturalis* only, though the master could sue *civiliter* for any advantage under the contract.

[2] Cf. J. iii. 19. 9 and 10. Children were said to be *infantiae proximi* during their eighth year, and *pubertati proximi* during their thirteenth. But see Moyle, 5th ed. p. 416.

conditions could not be parties to a stipulation.[1] A woman under *perpetua tutela* was in the same position as a pupil over seven.[2]

(ix.) A stipulation was void if an impossible condition were added to it, *e.g.* 'Do you promise me ten *aurei* if I touch the sky with my finger?' but if the stipulation were, 'Do you promise me ten *aurei* if I do not touch the sky with my finger?' the condition was disregarded and the stipulation valid.

(x.) A stipulation *inter absentes* was, as we have seen, void, but, under a constitution of Justinian, if the contract had been reduced to writing, and the writing stated that the stipulation had been made by the contracting parties in the presence of each other, this raised a presumption that they had been present, which could only be rebutted by the clearest proof that the parties were in different places during the whole day on which the contract was alleged to have been made.

(xi.) In the time of Gaius the following stipulations were void:

(*a*) *Post mortem meam* (or *tuam*) *dari spondes?*

(*b*) *Post mortem patris* (or *domini*) *mei dari spondes?*

(*c*) *Pridie quam moriar*, or, *Pridie quam morieris dari spondes?* And Gaius says that the objection to (*a*) and (*c*) was that it was not in conformity with principle for an obligation to begin in the *heres*, as he was not a party to the stipulation: *nam inelegans esse visum est ab heredis persona incipere obligationem.* But if A has acquired a right (or incurred an obligation) under a stipulation, his heir will be entitled (or bound); as he inherits the right (or the obligation), it does not *begin* with the heir.[3] In (*b*) the objection

[1] G. iii. 104. [2] G. iii. 108. [3] G. iii. 100.

was that the right was in fact acquired by the *pater* or *dominus*, and not by the promisee. Justinian made all three stipulations valid.

(xii.) But a stipulation *cum moriar* or *cum morieris dari spondes?* was valid even in the time of Gaius,[1] for here the right vested at the last moment of life, and so could be inherited by the heir.

(xiii.) Formerly also a stipulation *praepostere concepta* was void, *e.g.* 'If the ship *Barbara* arrives next Monday from Asia do you promise to give me five *aurei* to-day?' Justinian made such a contract valid, but performance could not be demanded until the condition was fulfilled.

(xiv.) A means to promise B his slave Pamphilus, but by mistake promises Stichus; the stipulation is void. (Error *in corpore.*)

(xv.) So too a stipulation *ex turpi causa*, *i.e.* tainted by illegality or immorality, *e.g.* a promise to commit homicide is void.

C. *Actions.*—The stipulation was enforced by one of three actions, according to the nature of the case. Where the object of the stipulation was a definite sum of money the remedy was *condictio certi* or *certae pecuniae*; where the object was the delivery of a definite thing (*certa res*) the remedy was *condictio triticaria*;[2] and where the object was the doing of an act there was an *actio ex stipulatu*. If there was a penal stipulation for the non-performance of the act a *condictio certi* could be brought upon it. The actions upon a stipulation, like the contract itself, were *stricti juris*.

[1] A stipulation to take effect after the death of a third person was valid (J. iii. 19. 16).

[2] From *triticum*, grain, which would be a common object of a *stipulatio* in early times with an agricultural race.

D. *Joint debtors and creditors.*—A promise could be made by means of a stipulation to two or more persons (*adstipulatores*),[1] and two or more persons could jointly make a promise, by *stipulatio*, to another (*adpromissores*). In each case the whole thing promised was due to each stipulator and from each *promissor*. But in each obligation there was only one thing due, so that if either of the joint parties received or gave the thing due the obligation was at an end (J. iii. 16. 1).

(*a*) *Adstipulatio* was chiefly used in early law for the purpose of agency. A is making a contract with B, and wishes to guard against not being able to see it carried out, *e.g.* because he is going abroad. Instead, therefore, of merely making the stipulation himself with B, he gets B to promise the act to himself and C. A asks B, 'Do you promise', etc., then C asks the same question, and B replies, '*Spondeo*'. C is, of course, more than an agent; he is one of two principal creditors, and can sue B in his own name; but C is bound, as regards A, not to abuse his rights, and he must make over to A whatever he recovers from B. Another use of *adstipulatio* was to evade the rule which, prior to Justinian, prohibited a stipulation so expressed as to take effect only after the death of the parties. If, *e.g.*, A wished that B should make payment after A's death to his (A's) heir, A and C would jointly take a stipulation from B. Then if C survived he could sue on the stipulation and was bound to account for what he recovered to A's heir (G. iii. 117). It was superseded by the contract of *mandatum*.

(*b*) *Adpromissio* or joinder of debtors was chiefly used for the purpose of suretyship or guarantee, the

[1] The right of an *adstipulator* did not pass to his heir.

essence of which, according to the modern conception, is that C (the surety) promises to pay or perform A's debt or other obligation to B if A does not. In the time of Justinian the only manner of constituting suretyship by a verbal stipulation was *fidejussio* ;[1] the two earlier forms, *sponsio* and *fidepromissio*, mentioned by Gaius, having become obsolete in Justinian's time.

Sponsio, which only applied where all the parties were *cives*, was formed by the use of the words *Spondesne, Spondeo*. *Fidepromissio* was not confined to citizens, and the words used were *Fidepromittisne? Fidepromitto* ; both forms were only applicable where the debt which was being guaranteed was itself created by *stipulatio*, and in neither case was the heir of the surety liable. The following laws applied to these two forms of suretyship, the first to *sponsio* only :

(i.) A *lex Publilia* provided that a surety by *sponsio* who had been compelled to pay the debt could recover from the principal debtor, who failed to repay him within six months, twice the amount of the debt by the *actio depensi*.

(ii.) A *lex Apuleia* provided that if, there being several sureties, one had been obliged to pay more than his fair share, he might by an *actio pro socio*[2] recover the excess from his co-sureties.

(iii.) *A lex Furia*, which did not apply to sureties outside Italy, limited the liability of sureties to two years from the date of the contract, and provided that each should be liable only for his own share.

(iv.) *A lex Cicereia*[3] required the creditor to inform an intending surety of the amount of the debt and the

[1] J. iii. 20. [2] G. iii. 122.

[3] The dates of all these laws are unknown.

number of sureties, and a *lex Cornelia*, 81 B.C. (which, unlike the above laws, also applied to *fidejussores*), provided that no one should become surety for the same debtor to the same creditor in the same year (*idem pro eodem, apud eundem, eodem anno*) for more than 20,000 sesterces, the excess only being void.

Fidejussio, which was the sole means of creating suretyship by stipulation in Justinian's time, and which must have dated back at least to 81 B.C., since the *lex Cornelia* of that year applied to it, was formed by the use of the words *Fidejubesne? Fidejubeo*, and not only was the surety bound, but his heirs also. An obligation could be guaranteed by this method whatever its nature; *i.e.* though it arose from some other form of contract than a stipulation, and even though it arose from delict. Further, the main obligation might be a *naturalis obligatio* merely, and might even be guaranteed by anticipation.[1] Each surety (*fidejussor*) was liable for the whole debt, and the creditor might therefore demand it from any one of the sureties he pleased, but an action taken to *litis contestatio* (*infra*, p. 411) or, after Justinian's changes, to judgment against one released all. Before Justinian, there was no necessity for the creditor to sue the principal debtor (*i.e.* the person whose debt had been guaranteed) before the sureties, though this would be *injuria* (*infra*) if the principal was able to pay, since it was a reflection on his solvency. Justinian, by a Novel, introduced the *beneficium ordinis* (or *excussionis* or *discussionis*), by which a surety could demand that the creditor should sue the principal debtor before proceeding against him, but such action did not release the others. A surety who had been

[1] J. iii. 20. 3.

compelled to pay could recover from the principal debtor by the *actio mandati*. As between the sureties themselves a rescript by Hadrian introduced the *beneficium divisionis*, which enabled one of several sureties when sued for the whole debt to demand that the claim should be divided between himself and the other solvent sureties.[1] Further, a surety called upon to pay the whole debt might avail himself of the *beneficium cedendarum actionum*, *i.e.* require the creditor before payment[2] to hand over to him all his remedies (including mortgages to secure the debt), and so, standing in the place of the creditor, sue the principal debtor for the amount paid, or the other sureties for their fair share;[3] he was regarded, not as having paid the debt but as having purchased the right of the creditor. A *fidejussor* could in no case be bound to pay more than the principal debtor, but might engage to pay less or to pay conditionally.

By virtue of a *S.C. Velleianum* (A.D. 46), suretyship or other *intercessio*[4] by women was forbidden, and a female surety, if sued on her promise, could accordingly plead the *exceptio S.C. Velleiani*. But the statute did not apply where the woman had been

[1] A remedy which was not so favourable as that given to sureties by *sponsio* or *fidepromissio* by the *lex Furia*, since under that law the liability was automatically divided among all sureties, whether solvent or not. A *fidejussor*, on the other hand, had to claim the *beneficium divisionis* (expressly), and was affected by the fact that some might be insolvent.

[2] After payment this could not be done, as payment extinguished all actions.

[3] Besides being constituted by verbal contract, suretyship might arise from (i.) *mandatum qualificatum* (p. 338), and (ii.) *constitutum debiti alieni* (p. 347).

[4] Suretyship was one species of *intercessio* (*i.e.* becoming liable on behalf of another); another kind of *intercessio* would be novating the debt of another by *stipulatio*, *i.e.* A stipulates with B (by way of novation) to pay the debt of C in consideration of C being discharged.

guilty of fraud, or where the object of the main stipulation was to provide a dowry for her daughter, or where the creditor was a minor and the principal debtor insolvent, or where it was for her benefit, or she had deceived the creditor, or to save her father from the consequences of a judgment. Justinian retained these provisions, but required, in addition, that an *intercessio* by a woman should be in writing, executed before three witnesses, unless given for value received, or to provide a dowry, or if she had been paid for it, or confirmed it after two years, otherwise it was to be absolutely void;[1] also that in no case should an *intercessio* for a husband be valid. The frequency of legislation in relation to suretyship bears witness to the common occurrence of that contract, and to the necessity of protecting those who were required by the social opinion of the times to accept the burden of suretyship.

(iii.) Contracts made 'litteris'.

Though an obligation could be created by a literal contract in the time of Gaius, the so-called literal contract of Justinian was not, in itself, a means of *creating* an obligation, but was the *evidence* of an obligation created in some other way, though this evidence might, by a kind of estoppel, become conclusive. Justinian is, therefore, rather illogical in classifying contracts *litteris* as a means of creating an obligation.

The true literal contract, as described by Gaius, may be defined[2] as a means of creating an obligation

[1] *I.e.* incapable of even being sued upon, so that there would be no need to plead the *exceptio* of the *S.C.*

[2] As will appear later, this definition needs qualification, but, with our present information, it seems impossible to frame a short and accurate definition.

to pay money by a fictitious entry (*expensilatio*) in the creditor's account book called the *codex accepti et depensi*,[1] with the consent of the intended debtor. A, with B's consent, enters the fact that B is indebted to him in fifty *aurei*, and thereupon B is under an obligation to pay, though no money has passed between them.

Such an entry might be one of two kinds:[2]

(i.) *Nomen arcarium*; *i.e.* a statement that money had actually passed between the creditor and the debtor, in which case no obligation *litteris* arose; the entry was merely evidence of the debt, but the debt, being actual, was sufficient in itself to create an obligation, with the very adequate remedy of a *condictio certae pecuniae*; and—

(ii.) *Nomen transcripticium.*

An entry by *nomen transcripticium* was where a creditor closed one account in his *codex* (*accepti relatio*) and opened a new one (*expensilatio*), and it was probably only under these circumstances that an *obligatio litteris* arose.

The subject will, perhaps, become clearer by examples:

(i.) A advances B money by way of loan (*i.e.* on a *mutuum*), and enters the loan in his *codex*. The obligation on B's part to repay arises on the *mutuum*, and is enforced by the *condictio* which that contract gives rise to; the entry is merely *nomen arcarium*, *i.e.* evidence of the real contract upon which alone the obligation depends.

(ii.) A has in the past had dealings by way of sale,

[1] In Muirhead's *R.P.L.*, at p. 249, the *codex* is called *accepti et expensi*.

[2] Another view is that it was one of *three* kinds: (1) *Arcarium*; (2) *expensilatio*, where, a previous transaction having taken place, *e.g.* sale, the parties agree that an entry shall be made of a debt (as if it were a loan), *e.g.* Pythius and Canius; (3) *nomen transcripticium*.

exchange, etc., with B, of which an account appears in his *codex* showing a balance against B for 500 *aurei*. A, with B's consent, closes this account by a statement on the opposite page (contrary to fact) that B has paid the *aurei* (*accepti relatio*), and opens a new account with the statement (contrary to strict fact) that he has advanced to B the sum of 500 *aurei*.[1] Hence the *expensilatio* represents a *nomen transcripticium*; a *nomen* (debt) has been transferred from one account to another, and, if the transaction was with B's express or tacit consent, B is, by virtue of the new entry merely (*ipso nomine*), bound to pay the money. In effect the old contracts between A and B have been novated, *i.e.* extinguished, one single obligation having been substituted in their place; obviously a course which offered many advantages to both parties, as it simplified the accounts,[2] and saved disputes about the previous transactions. And if the previous transactions had been contracts *bonae fidei* (*e.g. emptio venditio*), the creditor acquired a far better remedy in the *condictio* by which the literal contract, which was *stricti juris* and unilateral, was enforced.

(iii.) A has an account with B, the result of which is that B is indebted to him in 1000 *aurei*; he is unwilling to give B further credit, but will accept C as creditor in lieu of B, and C at B's request agrees. A makes an *accepti relatio* to B's account, and transfers the unpaid debt (*nomen*) to the opposite side of his *codex* by means of an *expensilatio*, which states (contrary to the strict fact) that C is indebted to him in 1000 *aurei*, whereupon C becomes bound *ipso nomine*.

[1] Often, but not necessarily, B would make corresponding entries in his own ledger.

[2] See the story of Pythius and Canius related in the third book of Cicero's *De Officiis*, mentioned in Muirhead's 3rd ed. p. 405.

The technical name for the transcription in case (ii.) was *transcriptio a re in personam*, in case (iii.) *a persona in personam*. These last examples (ii.) and (iii.) are the only instances of the true literal contract which Gaius gives.[1]

It would appear, therefore, that the normal use of the literal contract was for the purpose, not of creating a new, but of novating an existing obligation, as in the two cases cited, and it is not quite accurate to say that the essence of the transaction is that the obligation springs from the entry of a fictitious loan. It is true that if there were an actual present loan the transaction was a *nomen arcarium* (*i.e.* evidence of a *mutuum*), and not a literal contract at all. But in neither of the cases (ii.) and (iii.) above cited was the entry fictitious, in the sense that the person upon whom the obligation was imposed received no benefit. If it were a *transcriptio a re in personam* he (*i.e.* B in case (ii.)) had, in the past, received abundant consideration from the creditor (A); while in the case of the *transcriptio a persona in personam* the benefit C received was a present one, viz. the release of his friend or, it might be, creditor B from liability. That the literal contract was not, or was very rarely, used to create an original obligation is the less surprising when it is remembered that a gratuitous obligation to pay money could always be created by a simple question and answer (*stipulatio*), and that after (about) the year A.D. 200 a mere written promise to pay raised a presumption that a stipulation to that effect had been duly made. Of course, if a man wished to benefit

[1] The *chirographa* and *syngraphae* which Gaius mentions were written promises to pay, and, in that they raised an obligation though a stipulation had not been gone through, were peculiar to *peregrini* (G. iii. 134).

a friend or relative there was no reason why he should not instruct him to make a fictitious *expensilatio*, in which case the entries would be wholly fictitious and, nevertheless, binding; but, obviously, this was so much more cumbrous than a stipulation that it would be rarely, if ever, resorted to.

The literal contract was wholly obsolete in the time of Justinian, and for this there were three main reasons. In the first place, the formal contracts (verbal and literal) lost much of their efficacy [1] when Aquilius Gallus, in Cicero's time, first allowed a man who was sued upon such a contract to plead the *exceptio doli* (*i.e.* the defence of fraud or other substantial injustice).[2] Secondly, a new praetorian agreement, *constitutum* (which was a *pactum vestitum* [3]), was developed, which enabled an actionable obligation to be added to an existing obligation (which was kept alive), and gave the creditor an even better remedy than the *condictio*;[4] and, thirdly, as will be seen immediately, under the later law, a mere written promise to pay might, by the rules of evidence, result in an actionable obligation.[5]

The so-called literal contract of Justinian.

It has been stated already that after about A.D. 200 a promise to pay money which was in writing (*cautio*) raised a presumption that the promise was the result and evidence of a *mutuum* or of a proper stipula-

[1] Though the stipulation survived under Justinian.

[2] It has been suggested that, after this, the two formal contracts (*i.e.* the verbal and literal) entirely changed their character, and thenceforth, though ostensibly based on form, in reality depended upon what, in England, would be called consideration. But even in Justinian's time a stipulation, though gratuitous, was actionable.

[3] P. 346.

[4] G. iv. 171.

[5] For the literal contract generally see Roby, ii. 279.

tion, though this presumption could be rebutted by the person who had given the written promise; for, if sued, he was allowed to show that no stipulation had in fact been made. As time went on, however, it seems to have become customary for debtors to give what we should call I.O.U.'s (*cautiones*) without any suggestion of a preceding stipulation; this usage arose, partly from the above-mentioned practice of committing stipulations to writing, partly in imitation of the Greek *syngraphae* and *chirographa*. Suppose A has made a *cautio* in favour of B acknowledging indebtedness for a certain sum, then either there was a loan of which the *cautio* is merely evidence, or A may have been fraudulently induced to make the *cautio* in prospect of such a loan, which in fact was never made. Now if B sues A, and there was in fact a loan, the action lies on the *mutuum* or, it may be, the promise by stipulation given to repay the loan, the *cautio* in both cases supplying the necessary evidence and not being a literal contract. But if there had been in fact no loan, the *cautio* raises the presumption that there has been one, and B will be entitled to succeed, if A is not in a position to rebut the presumption. Aquilius Gallus allowed A to plead the *exceptio doli*; but this threw the burden of proving that the money had not in fact been paid over on A, which very likely he could not discharge. So about the close of the second century A.D., A was allowed to plead in defence the *exceptio non numeratae pecuniae*, which threw the burden on B of proving that the money had in fact been advanced. This defence could only be pleaded within a certain time, which under Justinian was fixed at two years. An artful creditor would naturally wait until this

time limit had expired before he brought his action. He could then only be met by the *exceptio doli*, and A might fail to discharge the necessary burden of proof. To prevent this, A could make the *exceptio non numeratae pecuniae* perpetual by notice to the creditor or to certain officials before the two years had expired. If he failed to do so, then after the period of protection had elapsed he would be obliged to fall back on the *exceptio doli*, and if he failed to prove fraud, and so rebut the presumption raised by the *cautio*, he would lose his case, not because of any literal contract, but because of the rule of evidence.

(iv.) Contracts made 'consensu'.

The consensual contracts, like the real contracts, were formless. They derived their validity not from the fact that they were executed in some particular manner, but because the transaction between the parties was worthy of being enforced on the grounds of expediency. In the real contracts, this element of expediency was *res tradita*, the handing over of a thing; in the verbal contracts, it was really in virtue of the solemn form originally in vogue, though, according to Justinian, it was the agreement of the parties (*sufficit eos qui negotium gerunt consentire*). But an agreement, *per se*, is merely a *pactum*, some *causa* is necessary, and here there is no *causa* beyond the agreement, yet the law seems to have annexed the binding force of an obligation to certain agreements because they were commercially important.

The consensual contracts (which were based upon the *jus gentium*)[1] were bilateral *negotia bonae fidei*, and

[1] The real contracts were also said to be *juris gentium*; but it may be doubted whether this is true of the *mutuum*, which was *stricti juris* and enforced by the *condictio*.

could be made *inter absentes*, were four in number: (1) *emptio venditio*, (2) *locatio conductio*, (3) *societas*, and (4) *mandatum*.

1. *Emptio venditio.*

Emptio venditio was the contract of sale. The vendor agreed to sell, the purchaser to buy, some object of property for a definite or ascertainable price, and the contract was complete at the moment the price was fixed, although the thing had not been handed over, and the price had not been paid, or anything given as 'earnest.' If the price were to be fixed by a third person, Labeo thought there was no sale, Proculus that there was.[1] Justinian decided that if the third person in fact fixed the price, the contract was valid; if he failed to do so, it was void. Formerly also it was doubted whether the price need necessarily consist of a sum of money. The Sabinians thought that the price might be a slave, a piece of land, or a toga, while the Proculians pointed out that if the price were anything else save money the contract was really exchange, and that the contract of exchange was one thing (*i.e.* an innominate contract), *emptio venditio* another. In the end, the opinion of the Proculians prevailed.[2] The practical point was that it was necessary to distinguish between the buyer and the seller, since their obligations were different. This requirement was satisfied if the price was partly in money, or, if originally fixed in money, something else was agreed to be taken instead. In the absence of fraud (*dolus*) the Courts would not inquire into the adequacy of the price, which must, however, be real, otherwise it was a *donatio*; but Diocletian is credited

[1] G. iii. 140. [2] J. iii. 23. 2.

with having provided, in the case of land, that if the price represented less than half the real value of the thing sold (*laesio enormis*), the vendor might rescind the contract unless the purchaser agreed to pay an additional sum, so as to make the price a fair one. The rule is probably due to Justinian, as there is no trace of it before his time.[1] It was often the custom, on entering into the contract, to pay something by way of earnest (*arra*) ; this was not an essential part of the contract, but merely evidence that the contract had in fact been made.

Justinian made certain changes in the law as to the formation of the contract. It would appear that in his time it was usual for some contracts of sale to be in writing (*venditiones cum scriptura*), probably to avoid disputes, while others could be made without written evidence (*venditiones sine scriptura*).[2] Justinian provided that where the sale was agreed to be *cum scriptura*, the sale was not to be binding unless the written contract (*instrumentum emptionis*) had been drawn up and written, or at least signed, by the contracting parties, or if drawn up by a notary (*tabellio*) the document must contain all the terms of the agreement and be complete in every way. Failing this, there was a *locus poenitentiae*, and either party might retract without loss, that is, if nothing had been given, as earnest. If, however, earnest had been given, then, whether the contract was *cum* or *sine scriptura*, the purchaser who refused to complete forfeited his

[1] Buckland, p. 484.

[2] An analogous distinction obtains in English law. An agreement for the sale of land, *e.g.*, is *cum scriptura*, *i.e.* cannot be enforced by action unless in writing, signed by the party to be charged (Sect. 4, Statute of Frauds), while some agreements for sale may be good without written or other evidence (*sine scriptura*), *e.g.* sale of goods under £10 in value.

earnest, while if it was the vendor who refused he was bound to restore double. If, of course, the sale was a *venditio sine scriptura*, and so complete, each party, though thus punished, had also to answer for breach of contract in the ordinary manner.[1]

Though the contract was complete when the price was fixed, or, in Justinian's time, if the contract were *cum scriptura* when the writing was complete, and so gave each party rights *in personam* against the other, the property did not pass, *i.e.* the purchaser did not acquire the ownership of the thing sold (and so rights *in rem*) until delivery (*traditio*), and the vendor was not bound to deliver the thing until he had been paid the purchase-money in full. Even delivery did not operate to pass the property until payment of the price, unless credit was given to the buyer by the contract. If, in the interval between the completed agreement and delivery, the thing perished without fault on the part of the vendor, the loss (*periculum rei*) fell on the purchaser (who had still to pay the price), contrary to the ordinary rule *res perit domino*. And in the same way, if the property unexpectedly increased or decreased in value, the purchaser gained or lost, as the case might be, *cujus periculum, ejus et commodum esse debet.*

All property (*res corporales* or *incorporales*) could be the object of a contract of sale except—

(i.) *Res extra commercium.* Here the contract was void. But if a man bought, *e.g.*, a freeman in ignorance, *i.e.* was deceived by the vendor, the sale was valid; it could not be specifically enforced, but the

[1] Justinian's provisions are not very clear. See further Girard, 8th ed. p. 576 and n. 3, and on the subject generally, Moyle, *Contract of Sale in the Civil Law*, p. 41.

vendor could be compelled by the *actio empti* to pay the purchaser the supposed value of his bargain (*quod sua interest deceptum eum non esse*).

(ii.) Things which both parties knew to be stolen.

(iii.) Things already belonging absolutely to the purchaser (*suae rei emptio non valet*).

(iv.) Things the alienation of which was forbidden, *e.g.* land forming part of the *dos* ; or forbidden to the particular purchaser, *e.g.* a guardian could not purchase the property of the ward.

The prohibition did not extend to the sale of a third person's property.

It was possible to sell things which had merely a potential existence, *e.g.*, next season's wool or fruit crop (*emptio rei speratae*) provided it materialised, and even the mere expectation of property, whether it materialised or not, *e.g.* whatever the next cast of the net might bring up (*emptio spei*). So too the sale of an existing *hereditas* was good, or of any other *res incorporalis* like a *usufruct*, but not *usus*, though it was possible to purchase the right to the creation of both of these.

A sale might be made subject to a condition, or varied by various collateral agreements (*pacta adjecta*). The most important of these resembled our sales on approval, of which there were two varieties : in the former, the purchaser bargained for a preliminary trial in the case of such consumables as wine (*emptio ad gustum*), or in the case of unconsumables (*pactum displicentiae*), *e.g.* a horse on trial. Here the ownership and the risk did not pass till approval was signified. More commonly the purchase was immediate, but the purchaser reserved the right to rescind the sale if the trial was not satisfactory. Here the ownership

and the risk passed at once, but accidental destruction or loss does not seem to have affected the purchaser's right to rescind. The vendor might bargain for the right to buy the thing back, or the purchaser the right to sell it back to the vendor at the original or some agreed price. By a *lex commissoria* the vendor could avoid the sale if the price were not paid by an agreed time. In short, the parties could, with certain exceptions, make their own bargain, since the contract rested on agreement alone.

The chief duties of the vendor, apart from any special agreement, were—

(i.) Until *traditio* to show the care of a *bonus paterfamilias* in the custody of the thing. As the risk was with the purchaser, the vendor was not liable for accidental loss, but must assign to the purchaser any rights of action he might have against third parties for loss or damage due to no default of his own.

(ii.) To make delivery on payment, together with all accessions and fruits.

But this obligation was limited to *tradere*, it was not *rem dare*, and therefore the vendor was not bound to make the purchaser owner or *dominus*, nor could the purchaser rescind merely because it turned out that the vendor was not owner, and so unable to grant *dominium* to him.

(iii.) But the vendor was bound, besides making *traditio*, to guarantee to the purchaser the undisturbed possession of the thing. Originally in a *mancipatio* there was, under the XII Tables, an *actio auctoritatis* for double the price if the vendor failed, within the period of usucapion, to defend the purchaser against anyone claiming by a superior title. In the case of a sale of a *res nec mancipi* of value it was usual to

stipulate for the same protection (*stipulatio duplae*), but where the value was small a *stipulatio habere licere* for the actual loss suffered was given instead. Actual eviction under a judgment was needed before a claim could succeed in the former case, but in the latter it sufficed if the vendor had a bad title. Later the purchaser could insist on such protection, and later still, one or other of these stipulations came to be implied. In the end the buyer became entitled to an indemnity for loss of his purchase through a defect in title.

(iv.) At civil law the vendor, in the absence of *dolus*, was not liable for defects in the quality of the thing sold. But the *curule aediles* introduced two new actions (*aedilician*), by means of which a *general warranty* was implied, first where slaves, and later where horses or cattle, were sold in open market (over which, of course, the *aediles* had control); and, subsequently, these remedies were, by the interpretation of the jurists, extended to all sales. The actions in question were:

(*a*) The *actio redhibitoria*, and

(*b*) The *actio quanto minoris*.

The former action enabled the purchaser who had been deceived by some serious latent defect in the thing sold to rescind the contract, and recover his purchase-money with interest; but the action had to be brought within six months (*menses utiles*) from the date of the contract. Alternatively, the purchaser might by the other action (*quanto minoris*) recover damages only, where the defect was not vital, and this action could be brought within one year (*annus utilis*). Apart from the two last-mentioned special actions, the ordinary action by which the purchaser enforced his rights was the *actio empti*.

The chief duties of the purchaser, apart from any special agreement, were :

(i.) To pay the price, together with any necessary expenses incurred, and

(ii.) On default of punctual payment (the contract being *bonae fidei*) to pay interest ; and the vendor's action to enforce his corresponding rights was the *actio venditi*. As already noted, these duties could be varied in almost every particular by arrangement between the parties.

2. *Locatio conductio* (letting and hiring).

The contract of letting and hire had three forms : (*a*) *locatio conductio rei*, (*b*) *locatio conductio operarum*, (*c*) *locatio conductio operis*.

(i.) *Locatio conductio rei* was where one party to the contract (*locator*) agreed to let the other party (*conductor*) the use of a thing for a money payment. The *locator* had the *actio locati*, the *conductor* the *actio conducti*, and the contract (as in the two other forms) was complete when the *merces* (the amount of the hire) was fixed. It had to be in money, except in the case of land, where it could be in produce ; and therefore if A lent B his ox for ten days, in return for a loan by B to A of B's horse for a like period, it was not a case of *locatio conductio*, but an innominate contract. If the thing let were a house, the *conductor* was called *inquilinus*, if a farm, *colonus*.[1]

Hire of this sort (of a *res corporalis*) presented certain close resemblances to sale ; both rested upon agreement, with a money consideration ; both were *juris gentium* and *bonae fidei*. Hence difficulties seem

[1] This kind of *colonus* must be distinguished from the *colonus* who was akin to a *servus*, as being *glebae adscriptus*.

to have arisen as to which of the two contracts were made in the following cases: (*a*) A lets to B a band of slaves as gladiators; B is to pay twenty *denarii* for each uninjured slave, and one thousand for each killed or disabled. Gaius says it was disputed whether the contract was sale or hire, but that the better opinion was (*magis placuit*) that it was *locatio conductio* in relation to the slaves uninjured,[1] but *emptio venditio* as regards those killed or disabled. The transaction could therefore be regarded as a conditional sale or hire of each slave.[2] (*b*) *Emphyteusis*, or leases of land in perpetuity at a rent, raised a similar doubt, but Zeno decided that they constituted a juristic transaction distinct from either sale or hire. (*c*) If a goldsmith were employed to make a ring out of his own gold, Cassius thought it was a case of *emptio venditio* of the gold and a *locatio conductio* of the goldsmith's services, but the opinion favoured by Gaius, that it was but a single transaction of sale, gained acceptance.[3]

With regard to the *periculum rei* (risk), there was a difference from the law of sale. The risk of loss remained with the *locator rei*, and therefore, if by accident the thing let were destroyed before the hirer got it, or if, while in his possession, and without his fault, it became useless, the hirer was released.

The *locator* was bound to deliver custody of the thing let and maintain the hirer in enjoyment of it. It must be fit for the purpose for which it was let, and maintained in that condition by him. He must pay for necessary expenses incurred in the preservation of the thing. The *conductor* had to accept custody

[1] For the *locator* got them back again after they had been hired for the exhibition.

[2] G. iii. 146.

[3] J. iii. 24. 4.

and show the care of a *bonus paterfamilias* in its use, paying the agreed *merces*, not using it for purposes not agreed upon, not altering its character, and restoring it at the end of the hiring in substantially the same condition as that in which it was received.

(ii.) *Locatio conductio operarum* was where one party (*locator*) let out his services to the other (*conductor*) in return for a money payment. The services so let could only be *operae illiberales*, and therefore advocates and physicians, surveyors, professors of law, and other skilled professional men could not conclude this contract.

(iii.) *Locatio conductio operis* was where one party (*conductor*) [1] agreed to make something out of, or to do a job in relation to, materials belonging to the other (*locator*) [2] for a money payment, *e.g.* A agrees to build B a ship with B's wood. As in the other cases, the price must be fixed, so if A agrees to clean or mend B's garments, and no definite price is fixed at the time, the implied reasonable price will not make the contract one of *locatio conductio*. It is an *innominate* contract, and can only be enforced *praescriptis verbis* by A, if he has done the work.

In all three cases of *locatio conductio* each party was bound to show *exacta diligentia* (*i.e.* the care of a *bonus paterfamilias*). Finally, though in the case of *locatio rei* death did not terminate the contract, in the other cases it might, *e.g.* if the contract were for personal services (*operarum*).

3. *Societas* (partnership).

[1] With the *actio conducti*.

[2] *Actio locati*: it will be observed that in this case the person who did the work was called the *conductor*; in *locatio conductio operarum* he was called the *locator*.

Societas was a contract by which two or more persons agreed to make a contribution of capital, labour, or the like, for some joint enterprise, usually, but not necessarily, commercial exploitation,[1] *e.g.* to carry on a tavern. The contract might take one of four main forms :

(i.) *Omnium bonorum.*
(ii.) *Omnium bonorum quae ex quaestu veniunt.*
(iii.) *Alicujus negotiationis.*
(iv.) *Unius rei.*

(i.) A *societas omnium bonorum* was a partnership which excluded the idea of any partner possessing private property ; for the agreement was that all property of the partners which they had previously owned in separate ownership, or which they might acquire during the partnership, was to become the common property of all.[2] Debts due from one partner only could be recovered by the creditor out of the partnership property, but damages occasioned by a partner's delict or wrong only so far as the partnership had been enriched thereby.

(ii.) *Societas omnium bonorum quae ex quaestu veniunt* was the form of commercial partnership which was presumed in the absence of other evidence, the partnership property being limited to property acquired by the partners in business transactions. Each partner might, therefore, have private property ; *e.g.* property which he acquired as *heres*, or by way of donation or legacy.

(iii.) A *societas alicujus negotiationis* was where

[1] Buckland, p. 504.

[2] This is one of the rare cases in which *dominium* passed by *nuda voluntas* ; *i.e.* by the partnership agreement, except as to after-acquired property.

the partnership was limited to gain in some particular business, *e.g.*, slave-merchants, and a species of this form of partnership was *societas vectigalis*; *i.e.* a partnership for farming taxes, which had the peculiarity that it was not dissolved by the death of one of the partners.

(iv.) A *societas unius rei* was one which had as its object some single transaction, *e.g.* the acquisition of ownership of land to prevent its commercial exploitation by others.[1]

Each partner was bound to make some contribution to the common purpose, whether of capital, skill, or labour. The share of each partner in the partnership property and in gain and loss was presumed to be equal. But this might be varied by agreement. One partner might, *e.g.*, agree to contribute all the capital, though the profits were to be equal, 'for a man's skill or labour is often equivalent to money'; and a partner might even, by special agreement, share the profits but not be liable for loss; but the converse case, *i.e.* where one partner shared loss but was wholly excluded from gain, amounted to a *leonina societas*, and the partnership was void. Each partner was bound to show good faith towards the others and *exacta diligentia*.[2] Each was entitled to share in the administration, but could not admit others to this without liability for any resulting loss. But the conduct of the business could be entrusted by all to a manager, who need not be a *socius*. A partner called upon by creditors of the firm (for the firm had not a distinct legal personality of its own) to pay more than his fair share had a right of contribution (*jus regressus*) against the rest, and was bound himself

[1] Buckland, p. 504. [2] *Ib.* p. 506.

to bring into the common fund whatever he acquired as a partner. The action by which a partner enforced his rights was the *actio pro socio*, and a partner who defended and was condemned in this action might incur *infamia*; while at the end of the partnership, the *actio communi dividundo* might also be available to enforce the proper division of the partnership property.

The rights and liabilities with regard to third persons were as follows. If all the partners entered into the contract, all could sue and be sued on it. If, on the other hand, one partner made a contract in his individual and private capacity, he alone could be sued. A more difficult case was where one partner made a contract on behalf of the firm. The firm, having no distinct legal identity, could not sue on such a contract; but, nevertheless, it could secure the benefit, for the partner who had entered into the contract could be compelled to cede his right of action to his copartners. Conversely, the firm, as such, could not be made liable, but the other partners might, as individuals, be sued if the contracting partner was their *mandatarius* (agent) by an *actio utilis*, and in certain special forms of the contract.

Ulpian tells us that a partnership might be dissolved *ex personis*, *ex rebus*, *ex voluntate*, *ex actione*.

(i.) It was dissolved *ex personis* (*a*) when one partner died,[1] and even if two or more were left the partnership was determined between them, as well as in relation to the deceased partner, even if the partnership articles otherwise provided, in which case it was a new *societas*. (*b*) *Capitis deminutio* had the same effect as death, save that under Justinian only

[1] Unless the *societas* was *vectigalis*.

maxima or *media* so operated. (*c*) Where one partner forfeited his property to the *fiscus* (*publicatio*), or on bankruptcy made a *cessio bonorum*,[1] or was sold up in bankruptcy.

(ii.) *Ex rebus* when the purpose for which it had been formed had been accomplished or become impossible; where the term fixed for the partnership had expired,[2] or where, the *societas* being *unius rei*, the thing in question had ceased to exist (*e.g.* a horse).

(iii.) *Ex voluntate.*—'*In societatem nemo compellitur invitus detineri*,' and therefore a partner could retire by mutual agreement, or against the will of the other partners by renouncing, even though a term was fixed for the continuance of the partnership and had not expired, or in spite of an agreement not to renounce. But the retiring party had to compensate the others for a withdrawal which unfairly prejudiced their interests, and if the partner retired from some secret motive, *e.g.* to secure for himself a prospective gain, his *callida renuntiatio* did not avail him, for he was obliged to share the profit, when it accrued, with his copartners. For example, A, who is a partner in a *societas omnium bonorum*, hears that he is about to become heres to B, a rich man who is dying. He at once retires, and after the partnership has been so determined B dies and A becomes heir. A is bound to share the advantages with his former partners. Lastly—

(iv.) *Ex actione.*—A *societas* may be dissolved by an *actio pro socio*, except where that was brought for minor adjustments. Condemnation involved *infamia*,

[1] But in this case the parties might, if they wished, agree to continue, and so constitute a new partnership (J. iii. 25. 8).

[2] This might be classed separately as *ex tempore*.

but probably only in the case of *dolus*.[1] The action *communi dividundo* lay for a division of the common property, and the rights and liabilities connected therewith.

The special form of *societas* known as *vectigalis* had for its object the purchase from the State of tax-farming, a right sold by public auction and generally for five years. There might be contributors who were not *socii* called *participes*. Death did not end the contract as a rule. By agreement the *heres* of a deceased partner could take his place, and this did not make it a new partnership. It may have been a type of corporation, the rights and duties attaching to the whole and not to the individual partners.[2]

4. *Mandatum* (agency).

A mandate was a contract by which one person (*mandatarius*) gratuitously undertook to do some service at the request of another. The service had to be a future one, and could not have an unlawful or immoral object. If the service were to be paid for, and the amount fixed, the case was one of *locatio conductio*; if the reward were not fixed, the transaction might amount to an innominate contract. Though gratuitous in form there might in fact be an agreement for a *honorarium* enforceable *extra ordinem* (a special form of proceeding). A *mandatum* required no special form, and might be made conditionally, or to take effect from some future time. The contract was formed when the *mandatarius* (agent) undertook the business (he was, of course, free to refuse), and from that moment the *mandator* had the *actio mandati directa*, the agent the *actio mandati contraria*. But

[1] Buckland, p. 509. [2] Buckland, p. 511.

though the agreement was thus a complete one, as it rested on agreement alone, so long as nothing had been done in pursuance of the mandate, either party could determine the contract. If, however, it were the agent who renounced, he was bound to do so as soon as possible (*quam primum*), so as to enable the *mandator* to get the business carried through in some other way, and if the renunciation were too late for this to be possible the *mandator* had his *actio mandati* against the agent unless the agent had some good legal excuse (*e.g.* the *mandator* had become bankrupt, or the agent was suddenly overtaken by a serious illness).

Since the *mandator* could revoke before the *mandatarius* had proceeded to act, and the latter could renounce before he had entered on his commission, provided this did not prejudice the *mandator*, whereas he could not do so once he had begun it, it has been suggested that mandate is more like a real than a consensual contract, or at any rate stands half-way between the two classes of contracts. This is not so, for it does not in the least resemble a real contract where delivery of a *res* constituted the *causa obligationis*. Neither is it predominantly like the innominate contracts, where action does not lie till one party has performed his part and so put the other under a legal duty to perform his, for in mandate the agreement itself binds, and though such an agreement is within the limits noted revocable, in the absence of such revocation or renunciation there is no doubt that the agreement binds.

Justinian states that a mandate might take one of five forms :

(i.) *Mandatum sua*, or *mandantis gratia*, for the benefit of the mandator alone ; *e.g.* a request that the

agent should conduct his (the *mandator*'s) business or buy an estate for him.

(ii.) *Tua et sua*, for the benefit both of the agent and the *mandator*; *e.g.* a request that the agent should lend money at interest to a friend, who was the mere nominee of the *mandator*; the *mandator* benefits by the loan, the agent by getting interest on his money.

(iii.) *Aliena*, for the benefit of a third person; *e.g.* where the request was to manage the affairs of Titius, a friend of the *mandator*.

(iv.) *Sua et aliena*, for the benefit of the *mandator* and a third person; *e.g.* the *mandator* asked the agent to manage property belonging jointly to the *mandator* and Titius.

(v.) *Tua et aliena*,[1] for the benefit of the agent and a third party; *e.g.* where the request was to lend money at interest to a third person.

A request for such a loan was called *mandatum credendae pecuniae*, or *mandatum qualificatum*, and was a form of suretyship, being usually associated in the *Digest* with *fidejussio*; for a man who requested another to lend money to a third person was held to promise repayment himself if the third person made default. But a contract of suretyship by *mandatum qualificatum*, though it closely resembled one formed by *fidejussio*, had certain minor distinctive features; *e.g.* the principal debtor and *fidejussor* being liable for the *same* debt, the *fidejussor* was originally released if the creditor sued the debtor, and the action reached *litis contestatio*,[2] whereas the *mandator*, being liable

[1] As Dr. Moyle points out (5th ed. p. 447), another possible form would be in the interest of all three (*sua, tua, et aliena*), as where A asked B to lend money at interest to C to enable C to repay a loan owing to A.

[2] P. 411.

on a separate contract, could be sued, although the agent had first sued the third person, to whom, at the *mandator*'s request, he had lent money ;[1] further, the *mandator*, even after paying the agent, could demand that the actions should be transferred to him if still subsisting.

A *mandatum tua gratia*, *i.e.* merely for the benefit of the agent, created no obligation *quia nemo ex consilio mandati obligatur*. If, therefore, one merely advised another to do something which concerned him alone, the contract of *mandatum* was not formed : it was a case of *consilium* (advice) ; *e.g.* B is doubtful whether to invest his money in the funds or to buy land with it. A suggests the former course. B follows his advice and suffers loss. B cannot in classical law recover the loss in the absence of fraud; but Justinian seems to have granted an *actio contraria* if it appeared that B would not have acted as he did but for the advice.

The duties of the agent who had accepted a *mandatum* were as follows: (i.) To execute it (unless he promptly disclaimed) ;[2] (ii.) to show *exacta diligentia* ;[3] (iii.) to make over to the *mandator* anything he acquired in the execution of the mandate (*e.g.* the horse, if the mandate was to buy one), and also any actions relating to the transaction ; (iv.) to render a proper account.

These duties could be enforced by the *actio mandati*

[1] Justinian, however, placed the *fidejussor* in the same position as the *mandator* in this respect. [2] *Vide supra.*

[3] He must, therefore, not exceed his instructions (J. iii. 26. 8). If being instructed to buy at 100 *aurei* the agent bought at 150, the Sabinians thought that he could not even sue the *mandator* for 100 *aurei*. The Proculians held that the action would lie for the less amount, and this opinion prevailed (*quae sententia sane benignior est*). The agent could, of course, buy for less than the sum authorised.

directa, condemnation in which carried infamy. The *mandator*, on the other hand, could be compelled by the *actio mandati contraria* to reimburse the agent and indemnify him against all expenses and liabilities properly incurred in the execution of the commission.

The contract ended—

(i.) Where the object was accomplished or became impossible.

(ii.) By the mutual agreement of the parties, even in course of performance.

(iii.) By one party repudiating before performance;[1] and

(iv.) By the death of either party *before* the mandate had been executed; but—(*a*) if the agent executed the mandate after the death of the mandator and in ignorance of his death, he was allowed, nevertheless, *utilitatis causa*, to bring the *actio mandati contraria* against his principal's heirs; and if the agent died in course of performance his heir was bound to complete the business. (*b*) If the *mandatum* were for an act to be done after the *mandator*'s death, it probably remained good in spite of the death of the principal.[2]

The chief applications of mandate.

1. *Agency.*—In modern systems the law relating to agency has received a very complete development, due to the expanding needs of commercial intercourse, so that if an agent duly authorised by a principal with the necessary capacity, acts within the terms of his authority, he merely establishes direct contractual relations between his principal and the other party,

[1] *Vide supra.*

[2] A mandate that something should be done after the death of the agent, *i.e.* by his heirs, was void in the time of Gaius (G. iii. 158).

but himself acquires no rights and incurs no liabilities if he makes it clear that he is acting merely as an agent. In early Roman law the need for an agent could not have made itself seriously felt, owing to the possibility of employing persons in power like slaves and *filiifamilias* for the purposes of business. But these are in no sense agents; they are mere messengers or intermediaries. In the field of contract any rights acquired through them were not acquired by them, but by the *dominus* or *pater*, who could alone enforce them. On the other hand, these subordinates in the *familia* could not burden their superior with any obligation. This unfairly one-sided state of affairs was corrected by the praetor in the *actiones adjectitiae qualitatis* in the following cases:

(*a*) The *actio quod jussu* lay where the *dominus* or *paterfamilias* expressly authorised the business. He was fully liable; but this is not a case of agency, for it is confined to those in power, gave an added liability to any that may have been incurred by the slave or son, and does not seem to have been dependent on the slave, etc., informing the other party of the authority given to him. It was a case of *jussus*, and the praetorian action was merely a remedy for hardship that might otherwise be suffered.

(*b*) The *actio de peculio et in rem verso*, really a combination of two actions, where the *dominus* furnished a *peculium* and the slave traded with it. The *dominus*, etc., was liable up to the extent of the *peculium* as that stood at the time of judgment; but while he could deduct anything due to him from the *peculium* of the slave, etc., he was fully liable to the extent of any profit to his own estate. Here, too, the requirements of agency are not satisfied, for, among other things,

the particular transaction that occasioned the loss may have been actually forbidden by the *dominus*. It is really a matter of rough justice that he who has supplied the means and made possible their employment for gain, should be liable up to the extent of the *peculium* supplied.

(*c*) The *actio tributoria* lay where a son or slave traded with his *peculium* to the knowledge of the master, the liability being limited to the part of the *peculium* so employed, but without any right in the master to make any preliminary deductions of what was due to him. The creditors called on the *pater-familias* to share out the *peculium* concerned between them and himself, if anything were due to him, proportionately to their respective claims. If they suspected an unfair share-out, they brought the action.

The above cases are confined to persons in the *familia*. In two cases the praetor extended the principle to persons not in the *familia*; *i.e.*—

(*d*) The *actio institoria* lay where a son, a slave, whether one's own or another's, or a freeman was appointed *institor*, that is, to the management of a business, to recover all that was due on contracts entered into in connection with it.

(*e*) The *actio exercitoria* lay where one person, called the *exercitor*, appointed another to the charge of a trading ship, for all contracts entered into by such *magister navis* in connection with the adventure.

Apart from these special cases, the nearest approach of Roman law to the modern conception of agency was the mandate, which worked in this way. Let us suppose that A at Rome, wishing to buy a house from B who resides in Tarentum, gives C (at Tarentum) a mandate to enter into a contract for its purchase at

a certain price, and that C duly agrees to buy it. This gives A no rights under the contract even if C informs B that he is acting for A, and so it is not agency in the modern sense. C is bound to hand over to A the rights against B that he has acquired, and so he gives A a mandate to sue B for the house (*procuratio in rem suam*) in C's name and to keep it for himself. On the other hand, C is liable to B for the price. If he actually pays this he can of course recover it from A by the *actio mandati contraria*. But more commonly A will promise by stipulation to pay B the price, and thus novate C's liability to B, so that if A sues for the house it is as *mandatarius* of his *mandatarius*, while his liability to pay the price rests on the stipulation and not the sale. In a very few and very special cases there need be no *cessio* by C of the rights of action he has secured on A's mandate, for A was allowed an *actio utilis* in his own name. The view that A could always use an *actio utilis* wherever he could force C to make a *cessio* is agreed to be erroneous.[1] Papinian seems prepared to give B an action against A for the price, perhaps only if he was aware that C was acting for A, on the analogy of the *actio institoria*, which some call *quasi-institoria*.

2. *Suretyship.*—This application has been noted under *mandatum credendae pecuniae* or *mandatum qualificatum*.

3. *For the purpose of conducting litigation.*—No representation was generally possible under the earliest or *legis actio* system of procedure, but under the formulary system this was permitted, and a *procurator in litem* could be appointed by mandate for the purpose.

[1] Buckland, p. 517.

4. *The transfer of obligations.*—This subject will be dealt with more fully later on ;[1] here it suffices to say that the benefit of an obligation, but not the burden, could, in effect, be transferred by appointing an agent (*procurator*), a form of mandate, to sue for what was due, with an agreement that he could keep what he recovered for himself.

The classification in the *Institutes* of contractual obligations as arising either *re*, *verbis*, *litteris*, or *consensu* is not exhaustive. Such an obligation might also arise from an innominate contract and from a *pactum vestitum*. It remains, therefore, to consider these two sources of obligation before dealing with obligations *quasi ex contractu* and the means by which contractual rights and liabilities could be transferred (otherwise than by a *successio per universitatem*) and terminated.

Innominate contracts.

Professor Buckland points out that to treat innominate contracts as an extension of the real contracts is a mistake, for the real contract bound by reason of the delivery of some *res corporalis*, whereas the innominate contracts rest upon the principle that ' in an agreement for mutual services performance on one side binds the other. The essence was the *quid pro quo* which was absent in the contracts *re*.'[2] These contracts being of comparatively late development did not fall within any of the named classes of contracts, and hence came to be called innominate contracts by modern civilians. The Romans do not even mention them among the contracts, though Paul gives a rough classification presently to be considered.

[1] P. 352. [2] Buckland, p. 519.

Girard holds that they were not completely generalised until Justinian. The general principle is that each party has promised to give or do something in return for a similar promise from the other, and one of the two has carried out his promise ; it is obviously unfair that the other should withhold performance on his side. Thus A promises to help B with his harvest if B will return the service ; B promises to do so. So far it is a mere *nudum pactum*. A carries out his promise : this puts B under a legal duty to perform his part, and to enforce this there is an *actio praescriptis verbis*. The material part of the formula begins with *praescripta verba*, *i.e.* a preliminary explanation of the circumstances under which the action is claimed, since the agreement itself has no specific name.

Paul classifies them as follows : (1) *do ut des*, (2) *do ut facias*, (3) *facio ut des*, and (4) *facio ut facias*. This scheme, it has been pointed out, is not exhaustive, since it makes no provision for cases where there is to be a forbearance on one side. The most important cases were those of (*a*) *permutatio* (exchange or barter), where A transfers the ownership of a *res corporalis* to B in consideration of B's promise to do the same to A with respect to some similar *res*. (*b*) *Aestimatum*, probably one of the earliest, consisted in an agreement to return within a certain time a *res* delivered or to pay its agreed value instead. This plan was adopted by travelling merchants and enabled the recipient (a dealer) to make a profit by selling the article for a higher price than he had agreed to pay, or to keep it if he so pleased. It is not in intention a sale, but it might of course become so.[1] (*c*) *Precarium* was the grant of property, usually land, to be enjoyed, at the pleasure of the grantor,

[1] For the question of risk see Buckland, p. 521.

without payment. The grantee had *possessio civilis* protected by the interdicts against third parties. It is unlike the other innominate contracts, for there is no *quid pro quo*. (*d*) *Transactio* is the compromise of a legal dispute based on some *quid pro quo*.

Pacta vestita.

It has been pointed out already that, according to the theory of Roman law, before a true contract could arise two elements were necessary: the agreement of the parties (*pactum*), and some legal reason (*causa*) why the agreement should be regarded as one which the law ought to enforce. If there were an agreement but no causa, the *pactum* was *nudum*, *i.e.* unenforceable by action, though in certain cases it was not without legal consequences, for—(i.) a *pactum* to pay interest produced a *naturalis obligatio*, and so afforded a defence to an action to recover money paid under it; and (ii.) if a *pactum* were added (*pactum adjectum*) to a contract which was a *negotium bonae fidei* (*e.g.* one of the consensual contracts), then, if added at the time, the *pactum* was regarded as part of the main agreement and equally enforceable; if added afterwards it gave rise to an *exceptio* merely.[1] Further, though a *pactum*, as such, never became actionable, it afforded a defence to a delictal action, and certain *pacta*, though not coming within any of the classes above mentioned, and though not *adjecta*, were enforced on their own merits, sometimes by the praetor, sometimes by virtue of express statutory provision. Where a *pactum* was enforced (whether *adjectum* or otherwise) it was known as *pactum vestitum*. An example of *pacta* which became *vestita* by virtue of the

[1] Cf. Sohm, 3rd ed. pp. 414-417.

praetorian influence (*pacta praetoria*) is afforded by the *constitutum debiti*,[1] which was an informal promise [2] to discharge some subsisting liability, either the promisor's own liability (*constitutum debiti proprii*), or the liability of a third person (*constitutum debiti alieni*), the remedy being the *actio de pecunia constituta* with a penal *sponsio* of half the amount. It is obvious that the *constitutum debiti alieni* was a third method of constituting suretyship,[3] and in some ways the suretyship so constituted was more stringent than where created by *fidejussio*, since, *e.g.*, the surety by *constitutum* remained liable even after the debt had been barred as against the principal debtor by lapse of time, whereas the *fidejussor*'s liability, in such case, was also terminated. Justinian applied to it the *beneficium divisionis* and *excussionis*. An example of *pacta* made actionable by imperial enactment (*pacta legitima*) is afforded by a promise to give a dowry, or, under Justinian, if registered or for less than 500 *solidi*, a promise of mere bounty (*pactum donationis*). Resting, as they did, on agreement only, the *pacta vestita* may be regarded as an extension of the principle of the consensual contracts.

Limits of the contractual obligation.

The effects of a contractual obligation were confined to the parties themselves; no one not a party to the contract could, in general, acquire rights or incur obligations under it. Thus Gaius tells us: *inelegans visum est ab heredis persona incipere obligationem*; an obligation cannot *begin* in the heres under a contract

[1] Another example is the *receptum, e.g. argentariorum* or *arbitri*. See Girard, 8th ed. pp. 643-646.

[2] *I.e.* not made by a stipulation.

[3] The others being *fidejussio* and *mandatum qualificatum* (*vide supra*).

entered into by his ancestor. But an heir could of course *inherit* the right under such a contract, and, where it was not purely personal in character, the burden as well. The fact that the rights acquired by slaves or sons in power accrued to the *paterfamilias* is not an exception to the rule, for they were in a sense his and merely represented him ; they spoke with his voice. There were a few exceptions before Justinian, which need not be considered here.[1] Justinian, in the cases already noted, violated the logic of the rule laid down by Gaius with respect to the heir, who could be bound or entitled under a promise or a stipulation of the testator or ancestor, and the praetorian *actiones adjectitiae qualitatis* formed an important group of exceptions. Apart from these, if A entered into a contract with B for the benefit of C, C could not enforce the obligation, not being within the contract, neither could A, for though he was a party to the contract he had no interest in its performance. The practical difficulty could be surmounted by A exacting a penal stipulation from B in case of B's non-performance in respect of C. Alternatively, A could contract with B in his own interest, and then by a mandate assign the benefit of the contract to C, who, however, must sue in A's name. If A, however, had a real *interesse* in the performance of the contract in C's favour, he can maintain an action for non-performance, *e.g.* where B promises A to pay C money which A owes C. On the other hand, if A promised B that C would give or do something for B, apart from Justinian's legislation where C was A's heir and bound to perform, C would not be bound to B, nor could B sue A, for A had made no undertaking for himself.

[1] See Buckland, pp. 423-424.

Yet if A undertook to see that C would discharge the obligation, this had the same effect as if he had undertaken the obligation himself. If not, B ought to take a penal stipulation from A in case of C's non-performance, and so protect himself. Where A had given a mandate to B to enter into a contract with C, Papinian allowed A to sue C directly, on the analogy of the *actio institoria*, but it is not clear whether C must be aware of the fact that B was contracting on A's behalf.

Subsect. 2. Obligations arising quasi ex contractu

In the case of the quasi-contracts the obligation was produced by *causa* alone; the parties had not in fact agreed, but an obligation was imposed upon them by law on equitable grounds; and since the relation between them seemed to be more akin to contract than to delict, where the obligation arises out of wrong, the obligation was said to spring, not from contract, for there was no *pactum*, but from an origin analogous to contract, *i.e.* to arise *quasi ex contractu*.[1] The following are the examples which Justinian gives of these obligations:

1. *Negotiorum gestio* was where one person managed the affairs of another without the authority of the latter; *e.g.* the *negotiorum gestor* repaired his friend's house during the absence of the latter from Rome to prevent the property from falling down. The relationship is akin to *mandatum*, but differs in that the *mandatarius* had *previous* authority. In a proper case of *negotiorum gestio*, however, the person who benefited by the act done was liable, although he

[1] The English 'contracts implied by law' rest on much the same basis.

had neither authorised nor ratified the act, and could be sued by the *actio negotiorum gestorum contraria* for the expenses or other liabilities which the *negotiorum gestor* had incurred in doing the work. But no case of *negotiorum gestio* arose unless—(*a*) the work were really urgent; (*b*) it had been done in the interests of the owner and with the intention of creating a case of *negotiorum gestio*; and (*c*) the *negotiorum gestor* had not been previously forbidden by the owner to undertake the business. The remedy of the principal was the *actio negotiorum gestorum directa*, by which the *negotiorum gestor* could be sued if in the conduct of the work he failed to show *exacta diligentia*. Practically the only recognition of the principle of *negotiorum gestio* in English law is in the case of salvage in the Admiralty Court.

2. The tutor's action against his ward, *actio tutelae contraria*, and the ward's *actio tutelae directa* arose *quasi ex contractu*. In the case of curator and ward the remedy was the *actio negotiorum gestorum*.

3. Two or more persons, without being partners, hold something in common, *e.g.* a house which has come to them as a legacy, and one of them has alone enjoyed the property or has been put to necessary expense in relation thereto; here the obligation to give an account of the profits or to share the expense was considered as arising *quasi ex contractu*, and could be given effect to in an action *communi dividundo*; or if the persons were co-heirs, by the *actio familiae erciscundae*.

4. The heir, on entering the inheritance, was bound to satisfy the claims of the legatees *quasi ex contractu*.

5. A person who received money not really due (even under a natural obligation) to him, but paid by

another through mistake of fact and received in good faith, was bound to repay it by an obligation arising *quasi ex contractu*, the action being the *condictio indebiti soluti*. Exceptionally, however, money paid by mistake could not be recovered; *e.g.* in the case of a *lis crescens*, *i.e.* where the amount recovered was increased if the liability were denied, as in an action under the lex Aquilia; or where, in the time of Gaius, a specific legacy had been given *per damnationem*; or, in the time of Justinian, a legacy or *fideicommissum* had been bequeathed to some pious foundation. In other words, if a person paid a claim which he thought was due on a *lis crescens*, and then found that he had been mistaken, and the money was not due at all, he could not recover, because by payment, which was in the nature of a compromise, he had really obtained a kind of advantage, *i.e.* he got rid of possible liability, if the facts had turned out otherwise, of having to pay an increased amount. Moyle suggests that, had the rule been otherwise, a person while in doubt as to whether something were due on a *lis crescens* or not, might have guarded himself by payment, and have then sued by a *condictio indebiti*, thus, in effect, denying liability; yet, if he failed, he would not incur the penalty of the increased sum, since he was himself suing on the *condictio*, not being sued on a *lis crescens*. But this can hardly be, for if the money was paid in doubt as to whether it was due, the *condictio indebiti* would not lie, for the payer must honestly believe it to be due. Further, as Professor Buckland points out, the payer would have to undertake a very heavy burden of proof and it is not easy to see how he could discharge it.[1]

[1] Buckland, p. 539.

Subsect. 3. The Transfer of Contractual Rights and Liabilities

Since every obligation implies a right, the subject of the transfer or assignment of obligations has two aspects. How, if at all, could (*a*) the liability under, and (*b*) the benefit of, a contract [1] be transferred by the act of the parties? [2]

In describing the methods by which single items of tangible property (*res singulae corporales*) could be transferred by one man to another (*e.g. in jure cessio* and *traditio*), Gaius [3] remarks that these methods of transfer have no application to obligations; which were not only *res incorporales* but were regarded by the Romans as personal to the contracting parties and, in some cases, so personal as not even to be capable of passing with the rest of the *juris universitas* to the heir.

The only manner in which *liability* under a contract could be transferred [4] was by novation, *i.e.* the person to whom the obligation was due had to consent. A, *e.g.*, owes B fifty *aurei*; the only method by which A's liability can be transferred to C, so as to make C B's debtor in lieu of A, is for all three to agree; B either taking a stipulation from C at A's request (*expromissio*), or, with the consent of A and C, making a *transcriptio a persona in personam*. The same rule, that liability under a contract can only be transferred (by act of the parties) with the creditor's consent, obtains in English law, and, obviously, the principle

[1] Or quasi-contract, but the term contract is used as including both.

[2] On a *successio per universitatem* (*supra*) obligations were transferred, not by act of the parties, but by operation of law.

[3] G. ii. 38.

[4] It is not strictly a transfer of the obligation, but the extinction of the old obligation and the creation of a new one.

is a sound one. It would be inequitable that one's debtor should have the right to escape further liability on his contract by substituting some man of straw to perform it.

Originally also the *benefit*[1] of a contract could only be transferred by novation, the person to whom the right was to be transferred taking, at the request of the original creditor, a new stipulation from the debtor, which operated to discharge the obligation owed to the original creditor, and to create a new one in favour of the transferee.[2] Novation is not strictly a transfer of the obligation, but the extinction of an existing obligation, and the substitution of a new one. Under the formulary procedure, however, the practice arose for the creditor to give the transferee a mandate to recover the debt, nominally as agent (*procurator*) for the creditor, but really on his own behalf (*i.e.* the transferee was to retain the debt when recovered). This species of mandate was known as *procuratio in rem suam*, and the formula in the action ran: 'If it appears that the debtor owes the original creditor fifty *aurei*, then condemn him to pay the said sum to the transferee'. This, of course, operated as an assignment, not of the benefit under the contract, as such, but of the right to sue for it, and even as an assignment of a right of action was defective, for, until the transferee sued and *litis contestatio*[3] was reached, the assignment became void if the original creditor revoked his mandate, or if the creditor or transferee died.[4] Further, the transferor could still receive payment, or grant a release from the liability. Later, however,

[1] *I.e.* the right to enforce the obligation which a contract created.
[2] G. ii. 38. [3] P. 357.
[4] In other words, the mandate was governed by the ordinary rules.

the principle became admitted, even at *jus civile*,[1] but probably not generally till Justinian, that from the moment when the transferee gave the debtor notice of the mandate the original creditor could not accept payment, or release the debt, and the debtor with notice who paid was not discharged, while revocation, express or by death, allowed the transferee to bring an *actio utilis* in his own name. Such assignments were usually in discharge of debts owed by the assignor to the assignee, and Anastasius enacted that the assignee of a debt could recover no more than he gave for it.

Thus Roman law reached much the same conclusion as English law in the matter of the assignability of the benefit of contractual rights, as the student will learn.

The Discharge of a Contract

An obligation arising from a contract might be extinguished or destroyed, *inter alia*—

1. By *contrarius actus*.
2. By performance.
3. By novation.
4. By subsequent impossibility.
5. By operation of law.
6. In some few cases by death.
7. *Ope exceptionis*.[2]

1. '*Contrarius actus*.'—According to the theory of the civil law, the *juris vinculum*, of which an obligation consisted, having been attached or tied to the

[1] Sohm, 3rd ed. p. 427.

[2] Sometimes also 'set off' (*compensatio*) might operate to discharge an obligation (see p. 426).

parties when the contract was created, had to be untied by reversing the process. Thus a debt created by *nexum* had to be released by *nexi solutio*, and probably, at first, this process of discharge was necessary even though the debtor had morally discharged himself by payment in full. As described by Gaius, however, *nexi solutio* seems to be a form of discharge when actual payment had not been made, for he describes it as *alia species imaginariae solutionis*, the process being as follows: The debtor, in the presence of five witnesses and a *libripens*, holds a piece of copper in his hand and says, in effect, to his creditor,[1] 'I weigh out to you this first and last pound of the money I stand bound to pay you, and so release myself by means of this copper and these copper scales from my obligation'. He then struck the scales with the copper and gave it to his creditor, as if in full payment (*veluti solvendi causa*).[2] Besides *nexum*, *nexi solutio* was the proper mode of release from judgment debts, legacies *per damnationem*, and probably from every form of *damnatio*. So an obligation formed *re* would be dissolved by the thing being returned (or, in the case of *pignus*, redelivery after due payment made); whence it seems that in the real contracts the *contrarius actus* was in fact performance of the obligation which the contract created. In the case of a verbal contract, however, the *contrarius actus* was not performance but a release by solemn words (*contrariis verbis*), without, it may be, payment actually taking place, in which case the *acceptilatio*,[3] as it was called, amounted

[1] G. iii. 174.

[2] Gaius says that this method of release was also employed in the case of a judgment debtor and an heir bound to a legatee *per damnationem*.

[3] See J. iii. 29. 2.

to an *imaginaria solutio*, *i.e.* a legal discharge. The usual form of *acceptilatio* was, '*quod ego tibi promisi, habesne acceptum?*' '*Habeo acceptum*'; and, of course, only applied to discharge an obligation created *verbis*; and therefore, if a debt arose in any other manner (*e.g.* on a *mutuum*), it could only be discharged in this way by novation, *i.e.* the debt was first novated by being made the object of a *stipulatio*, and then discharged by *acceptilatio*. Aquilius Gallus invented a general form of stipulation (*stipulatio Aquiliana*), by means of which any number of obligations, of whatever kind, delictal ones excepted, due from one person to another could be turned (by novation) into a single obligation, being summed up in one comprehensive stipulation, and then, if it were so desired, extinguished by *acceptilatio*.[1] In the case of the literal contracts, in the time of Gaius, the *contrarius actus* was *accepti relatio*, *i.e.* an entry on the opposite side to the *expensilatio*, that payment had been made, and this also might be an *imaginaria solutio*, for it was valid even though payment was not in fact made, *e.g.* when the creditor desired to make his debtor a release of the debt. Lastly, in relation to the consensual contracts, *contrarius actus* meant that, having taken their origin in consent or agreement,[2] such contracts could, so long as neither party had begun performance, be dissolved in the same way.

2. *Performance*, or *solutio* in the usual sense, is not only the natural manner of discharging a contract but, usually, the sole manner actually contemplated by the parties. When, *e.g.*, A agrees to sell and B to buy a horse for fifty *aurei*, the only method of discharge

[1] See J. iii. 29. 2.

[2] Though, as above pointed out, this needs qualification.

in their contemplation is that A shall deliver the horse and B duly pay the price. This method is accordingly mentioned in the *Institutes*, though probably in early times a formal release (*e.g.* by *nexi solutio*) might also, in some cases, be necessary. Gaius tells us that an obligation was extinguished by payment (or performance) of what was due, though if the creditor accepted something other than what was actually due there was a dispute. The Sabinians maintained that the obligation was, *ipso jure*, extinguished, the Proculians that at law the obligation remained, but that the debtor could defeat an action brought upon it by the *exceptio doli*. Justinian adopted the former opinion, for he tells us that in his time all obligations were extinguished by payment of the thing due or, if the creditor agreed, by something else being given in its place, and he adds that it made no difference whether the debtor himself performed the contract or someone else in his place, and this though the performance by the third person was without the debtor's knowledge, or even against his will. Justinian adds that in cases of suretyship, payment either by principal or surety extinguishes the obligation as against all parties.

3. *Novation*.—Here an existing obligation was destroyed by the fact that a new one was substituted for it, and, since the literal contract was obsolete in Justinian's time, the only method of novation dealt with in his *Institutes* is a novation by means of a *stipulatio*. Novation might take three possible forms: (i.) the substitution of a new creditor for the former creditor; (ii.) of a new debtor for the former debtor (*delegatio*, *expromissio*); or (iii.) the conversion of an existing obligation between the same parties into a stipulation; but in this case novation could not take

place, if the original obligation arose from a verbal contract, unless the new stipulation contained some new term (*ita demum novatio fit, si quid in posteriore stipulatione novi sit*), as, *e.g.*, the addition of a surety or a condition. If, however, the new element consisted of a condition, the novation only took place when the condition was fulfilled; until then the old obligation subsisted, but if before fulfilment the creditor sued upon the old contract, he could be defeated by the *exceptio doli*. For a novation to be valid the old obligation might even be a natural one, and, conversely, even though the new obligation were natural merely, the old obligation was extinguished, so that in such case the creditor could not sue on either obligation. So if a pupil, X, promised A, without his tutor's authority, to pay B's debt to A, there was a good novation, and since this extinguished the debt from B to A, and the new obligation between A and X was natural only (being made without consent), A had no right of action on either obligation. But if the novating promise was by a slave, the old debt was not extinguished,[1] which seems illogical, for the promise of a slave was capable of creating a natural obligation, but is not really so, for a promise by a slave was not a verbal obligation, though it created a natural obligation, and a verbal obligation was essential to novation. Justinian tells us that formerly difficulty was caused in consequence of the rule that the *stipulatio* only operated as a novation when the parties so intended, and not when they meant to create a second independent obligation, and that many (artificial) criteria were laid down to determine what the intention of the parties had been. He therefore provided that a

[1] J. iii. 29. 3.

stipulation should only operate as a novation where the parties expressly declared that their object in making the new contract was to extinguish the old one.

4. *Subsequent impossibility.*—An obligation was dissolved where its object became impossible without the fault of the debtor,[1] *e.g.* when the thing in question was absolutely destroyed.

5. *Operation of law.*

(*a*) In the time of Gaius an obligation was extinguished (by *novatio necessaria*) when an action[2] to enforce it reached the stage of *litis contestatio*. Thereupon a new obligation arose, viz. that the debtor should be condemned if found in the wrong, *post litem contestatam condemnari oportere*; just as after judgment his obligation was to satisfy it, *post condemnationem judicatum facere oportere*.[3]

(*b*) *Capitis deminutio*, by destroying the legal personality of the debtor, also extinguished his contractual obligations, but the praetor relieved against this by granting *in integrum restitutio*, or an *actio utilis in eos ad quos bona ejus pervenerunt*.

(*c*) Prescription (lapse of time) might have the effect of extinguishing an obligation (*vide infra*).

(*d*) The last instance of the dissolution of an obligation by operation of law is merger or *confusio*, viz. where the right to enforce the obligation and the liability to perform it became vested absolutely in one and the same individual, *e.g.* if A who owes B money makes B his heir.

6. Exceptionally, the death of a party might

[1] The term debtor, strictly applicable only to a money debt, is often for convenience, used generally to denote the person bound to perform an obligation, of whatever nature it may be.

[2] If a *judicium legitimum in personam in jus*.

[3] G. iii. 180.

extinguish a contractual obligation, *e.g.* in *societas* (except *vectigalis*), *mandatum*, or a contract for personal service (*e.g. locatio conductio operarum*). The general rule, however, was that contractual rights and liabilities passed on death to the heir.

7. *Ope exceptionis.*—In all the above cases the obligation became altogether extinguished (*ipso jure*), *i.e.* by operation of the *jus civile* upon a given set of facts. Where, however, an *obligatio* was met by an *exceptio*, *i.e.* a defence inserted in the formula, the obligation was not destroyed; if the *exceptio* were proved the action on the obligation failed but the obligation itself remained. If the *exceptio* were one which the defendant could always plead, the obligation remained for ever incapable of being sued upon with success; if, however, the *exceptio* were limited, *e.g.* was based upon an agreement on the part of the plaintiff not to sue within six months, then, the limit having expired, the *exceptio* could no longer be pleaded in answer to a new action. *Pactum de non petendo*, an informal agreement not to sue, operated under the praetorian edict as a defence, *exceptio pacti*.

Subsect. 4. Obligations arising ex delicto

Rights are of two main kinds: *in rem*, available against all the world; *in personam*, available against a particular individual. Some rights *in rem* have been described already, *i.e.* rights directly connected with the ownership or possession of property,[1] but there are other rights *in rem*, viz. those which a man enjoys to safety and reputation. The Roman lawyers, however, did not regard these rights in the abstract;

[1] *Dominium*, servitudes, etc.

for, as abstractions, they are comparatively unimportant; such a right becomes legally important only when a wrong has been done to it, *i.e.* at the moment when the person entitled to the right *in rem* acquires, by reason of its infringement by some definite individual, a right *in personam* against that individual. The infringement of certain rights *in rem* was at Rome called a delict, which, therefore, bound the offender to the person wronged by the same kind of *juris vinculum* as that to which contract gave rise, viz. an obligation; but the obligation was not to perform an agreement, it was to make satisfaction for an unlawful act.

The characteristics of a delict are as follows: (1) There must be some act by the defendant; an omission standing by itself was not a ground of liability, but where an act had been legally performed and required further acts on the part of the doer to avoid legal consequences for wrong, the omission of such further acts sufficed, *e.g.* where a surgeon having operated upon a slave neglects the case. (2) Such act must be in violation of a right *in rem* vested in the plaintiff. (3) The resulting wrong is of a kind in which early law permits vengeance to be taken, but later law, in the interests of public peace, substitutes an action. (4) Such action is not for compensation for damage suffered, but to penalise the wrong-doer and so to afford satisfaction to the injured party. (5) As vengeance can only be inflicted on the wrong-doer, it dies with him, so too the action given in lieu of it will not lie against the *heres* of the wrong-doer, who may, however, be liable to make restitution to the extent of any unjustifiable enrichment that has resulted from the wrong. For the same reason

capitis deminutio of the wrong-doer has no effect on his liability. (6) It follows from (3) and (4) that where the wrong was done by common action each of the wrong-doers was liable for the full penalty, and payment by one had no effect on the liability of the others. (7) Where the wrong affected property the heir of the injured party could sue for the penalty. (8) Lastly, the wrong had to be done either intentionally or negligently.

The delicts at Rome were, according to Justinian, four in number: (A) *furtum* or theft; (B) *rapina* or robbery with violence; (C) *damnum injuria datum* or damage to property; and (D) *injuria* or wrong to the person. Of these the first three are violations of those rights *in rem* which are connected with the ownership or possession of property; the last represents the violation of those rights *in rem* which a man enjoys wholly apart from property, *i.e.* the so-called 'primordial' rights of the normal citizen to safety and reputation.

There were, in fact, many other delicts, of which *metus*, *dolus*, and *servi corruptio* are the most important. The omission of these may be due to a desire not to overburden an elementary course, or to the artificial fourfold arrangement which characterises the law of obligations.

A. Furtum.

Justinian[1] defines *furtum* as follows: *Furtum est contrectatio rei fraudulosa vel ipsius rei vel etiam usus ejus possessionisve* ('theft is the handling with a wrongful intention (*fraudulosa*) of another's property, or of its use or possession'). To make this definition complete it is necessary to add that the thing stolen

[1] J. iv. 1. 1.

must be a *res mobilis* ; there could be no *furtum fundi* (theft of land), but if a *res immobilis* became *mobilis* by the theft, *e.g.* crops cut down or sulphur dug out, it could be stolen. Such *res* had to be *in commercio* ; there could not be theft of a *res nullius*, or a *res derelicta*, for there was no owner ; or of *res hereditariae* for the same reason ; but if someone had a right in the *res* less than ownership, *e.g.* a usufruct or a pledge, such person could sue ; and the heir might have an action after he had entered. There must be some physical handling of the thing (*contrectatio*) with the necessary *animus* ; there need not be an asportation (carrying away) as in English law, nor an appropriation, as *furtum usus* implies. That the handling must be without the consent of the real owner is sufficiently indicated by the word *fraudulosa*. Since ' intention ' was a necessary element in theft (*quia furtum ex affectu consistit*), a person of tender age was only liable if *pubertati proximus*.

Consistently with the above definition *furtum* took place not only when A appropriated B's property, but—

(i.) When A having the charge of B's property, *e.g.* on the contract of *depositum*, used it in an unauthorised manner (*furtum usus*),[1] or made away with it altogether, *e.g.* sold it (*furtum rei ipsius*). Therefore it was theft (*furtum usus*) to borrow a horse from a friend for a ride and take it into battle. But in these cases there was no theft if A honestly thought that B would permit the act (*quia furtum sine affectu furandi non committitur*), or where B really approved, even though A thought he was acting wrongfully, for there

[1] Hence *contrectatio* is not necessarily actual seizure from the owner, but any unlawful act of appropriation.

could be no theft with the consent of the real owner. Hence a curious result. A tells C, the slave of B, to steal B's mare for him. C tells his master B, who, wishing to convict A, allows the slave to take the mare to A. B cannot have the *actio furti* against A, because B was willing that the mare should be taken, and he cannot have an action against A for corrupting his slave (*actio servi corrupti*), because the slave has not been in fact corrupted.[1] But Justinian provided that the attempt should be enough to found both actions.

(ii.) Since *furtum* included *furtum possessionis* it might happen that a man might steal his own property, *i.e.* property of which he had *dominium*, the possession being vested in another, as where a debtor fraudulently took away from his creditor something he had given by way of pledge to secure the debt.[2]

(iii.) A finds property on the seashore cast away in a shipwreck, or on the road, having been dropped by accident. The inference in such case is that the late owner did not intend to abandon *dominium*, and if A appropriates the property *lucrandi animo* he commits theft.

(iv.) The appropriation need not be a personal act, for a person who assists another to steal is equally guilty ; so if A knocks money out of B's hand that C may steal it, or obstructs B so that C may carry off something belonging to him, or drives away B's cattle, *e.g.* by frightening them with a red rag, that C may steal them, or puts a ladder under B's window, or breaks a window or a door for C to enter by, or, knowing the purpose to which the tools or ladders will be

[1] G. iii. 198. Of course the owner could recover the mare by a *vindicatio*.

[2] It was also *furtum* if the mortgagee (*creditor pignoris*) sold the mortgaged property to realise his security without the debtor's consent.

put, lends such things to C, who uses them to carry out a theft, in every case A is liable to the *actio furti*. A person, however, who did not assist but merely advised the commission of the act was not liable to the *actio furti* unless he suggested ways and means, and where an act which helped another to commit theft did not amount to intentional assistance, but arose from recklessness or folly (*per lasciviam*), the *actio* was *in factum concepta*.[1]

(v.) Sometimes there may be theft of free persons, as where A steals B's *filiusfamilias*, or, formerly, his wife *in manu*, or his *debitor addictus*. The last two were obsolete under Justinian. In the case of a *filusfamilias* the father brought, not the usual *actio furti*, but a *vindicatio* in which any pecuniary loss suffered would be taken into account.

There was a distinction, which continued down to Justinian's time, between *furtum manifestum* and *nec manifestum*. The former was where the thief was either caught in the act (*in ipso furto*) or in the place where he had committed the act, *e.g.* in a house where he had stolen property, or a vineyard where he had been stealing fruit, or when he had been seized on the same day still holding the *res furtiva* before reaching the place where he meant to stay the night. If, however, he once took it to its destination the theft was, and thenceforth continued, *nec manifestum*, although the thing were found on the wrong-doer.[2] The importance of these rather subtle distinctions lies in the fact that under the XII Tables the penalty for *furtum manifestum* was capital. A freeman, convicted of the

[1] P. 420.

[2] There was a dispute about these distinctions in the time of Gaius G. iii. 184).

charge, was scourged and then adjudged as a slave[1] (*addictus*) to the person he had wronged; a slave, scourged and hurled from the Tarpeian rock. Subsequently, however, the penalty was considered excessive, and reduced by the praetor; thenceforth the penalty recoverable by an *actio furti manifesti* was four times the interest of the plaintiff, whether the thief was a freeman or a slave. The penalty for *furtum nec manifestum* was always twofold; with this the praetor did not interfere, and these penalties continued to be the same in Justinian's time.[2]

Formerly there were also four special actions for exceptional cases of theft, viz. *furti concepti*, *oblati*, *prohibiti*, and *non-exhibiti*. The *actio furti concepti* was an action against the 'receiver' of stolen property. When, after a search in the presence of witnesses, stolen property was found on a man's premises he was liable to the *actio furti concepti*, by which a penalty of triple value could be obtained both by the XII Tables and the praetor's edict. The *actio furti oblati*, also for three times the value, lay where one person placed stolen property on another's premises, that the property might rather be discovered there than in his own house. The action was in favour of the person upon whom the goods had been 'passed off' against the other, whether the latter were the actual thief or not. The *actio furti prohibiti* was the outcome of a provision of the XII Tables (*furtum lance licioque*

[1] Some lawyers thought, however, that the *addictio* did not make him an actual slave, but placed him in the same position as a *debitor addictus* (G. iii. 189).

[2] The disproportion between the penalty for *furtum manifestum* and *nec manifestum* is a striking proof of the fact that at Rome, at any rate, there was a period when the State was not strong enough to suppress crime without 'buying off' the vengeance of the person wronged.

conceptum) which enacted that if a person (suspecting another) wished to search a suspect's house, he must be naked save for a girdle, and carry a platter in his hands. If anything was so discovered the case was one of *furtum manifestum*. The XII Tables did not impose any penalty upon the occupier who prevented search, and to meet this the praetor provided a penalty of four-fold, for which, Gaius says, the *actio furti prohibiti* could be brought against a man who prevented another from searching his premises for stolen property ; the particular method of search, however, was not strictly observed in Gaius's time. Finally, by means of the *actio furti non exhibiti*,[1] a penalty (the amount is not stated) could be obtained, under the praetor's edict, from a man who failed to produce a *res furtiva* which, after search, had been found on his premises. Justinian says these four actions had fallen into disuse in his time ; where persons knowingly received and concealed stolen property they were liable to the action for *furtum nec manifestum*.

In Justinian's time, accordingly, the owner of stolen property had—

(1) The *actio furti manifesti* for four times the interest of the plaintiff, or—

(2) The *actio furti nec manifesti* for double the value of the plaintiff's interest. This might be the value of the thing, or less, depending on the circumstances ; and he had, in addition—

(3) A *vindicatio* to recover the thing itself, which might be brought against the thief or anyone else, or alternatively a *condictio* (for the recovery of the thing or its value), which might be brought against the thief or his heirs, though not in possession of the thing

[1] J. iv. 1. 4.

stolen. In practice the latter was usually chosen as the burden of proof was lighter than in the *vindicatio* ; or—

(4) An *actio ad exhibendum* against anyone who had possession of the thing or had fraudulently parted with it ; if it were not produced the defendant had to pay the ' interest ' which the plaintiff had in not losing the property.

It was an anomaly to allow the owner a personal action (*condictio*) to claim his property, for the property (*i.e.* the *dominium*) was his already ; the only logical action open, therefore, was the *vindicatio* to recover its actual possession ; but the choice of either action was granted, we are told, by reason of the detestation in which thieves were held (*odio furum*).[1]

The *actio furti* (as distinguished from the other remedies) could be brought not merely by the owner but, according to Justinian, by anyone interested in the safety of the thing (*cujus interest rem salvam esse, licet dominus non sit*) and, conversely, the owner could not bring it unless it was to his interest that the thing should not perish. For example, a person to whom a thing had been mortgaged (*creditor pignoris*) could bring the action, and so could the *usufructuarius*, in fact anybody who had a right *in rem*, and the following who had a *jus in personam* only ; borrower, hirer, one entrusted with garments to clean and repair, *mandatarius*, *nauta*, *caupo*, and *stabularius*.[2] The *interesse* which entitled a person to sue might be (*a*) a positive one, which included all who had a right *in rem* like the *dominus*, *creditor pignoris*, usufructuary, usuary, and the *bona-fide* possessor ; in one case, that of the *colonus*, a right *in personam* sufficed ; or (*b*) negative,

[1] G. iv. 4 ; J. iv. 6. 14.

[2] On the ground that these were liable for *custodia*.

in the case of those who were responsible to the *dominus* for the loss, like the borrower, hirer, and the like. Here the *dominus* relied on his action on the contract, while the borrower and those like him alone could sue for the theft, unless they were or became insolvent, or the *dominus* released them from liability upon the contract; in which cases he had the action. There had been doubts about *commodatum*. Justinian gave the owner the choice of relying on his action against the borrower or suing the thief. If he took the former course not knowing of the theft, he could, when he learnt of it, proceed against the thief instead. A person with whom a thing had been placed by way of *depositum* could in no case sue the thief, since he was not liable for the safe custody of the thing and so not prejudiced. The *interesse* had to be *honestum*, so that a thief from whom the stolen article was stolen could not bring the *actio furti*.

B. **Rapina or vi bona rapta.**

Originally the fact that a theft was accompanied by violence made no difference to the penalty, but a special remedy for such cases was found, about the time of Cicero, who tells us that the praetor Lucullus constituted it a separate delict in 77 B.C. because of the frequency of crimes of violence which followed the Social War. This was the *actio vi bonorum raptorum* for four times the value of the thing, if brought within a year, otherwise for the simple value merely. The action was a 'mixed' action, *i.e.* not merely for a penalty, but for a penalty and compensation, since the value of the thing was included, so that the penalty was only three times the value.[1] There was no need

[1] Otherwise in *furtum manifestum*, where, by a *vindicatio* or *condictio*, the thing or its value might be recovered in addition to the fourfold penalty.

to take the thief in the actual commission of the crime, and the action was open to anyone with any interest in the property ; it need not be a real interest as in *furtum*, so even a person who merely had detention of a thing on *depositum* could bring it.[1] The action, however, did not apply where a man used violence under a mistaken impression that the thing really belonged to him, and that the law, in such case, allowed him to use violence.[2] But such a case was covered by a constitution of A.D. 389, which provided that no one, even the owner, might take away from another a movable thing by force, or, in the case of land, make forcible entry. If he did so he was, if owner, to lose his ownership ; if not owner, to restore the thing taken, together with its value.

Having regard to the fact that *rapina* necessarily included *furtum*, and to the penalties attached to *furtum* alone, it might appear that the only practical advantage of the praetor's remedy for *vi bona rapta* was in the case of a *furtum nec manifestum* accompanied by violence, the *actio* being brought within the year ; for then the injured person could recover three times the value by the *actio vi bonorum raptorum*, and only double by the *actio furti nec manifesti*. For *furtum manifestum*, or for *nec manifestum* when more than a year elapsed before action, the remedies for theft simply were obviously more advantageous. But this is not entirely so, for the *actio furti* lay for a multiple of one's *interesse*, which might not be much, whereas in *rapina* it was the actual value of the thing that was multiplied. The depositee had not the *actio furti*

[1] Provided he had an interest in the thing not being taken away by force (J. iv. 2. 1).

[2] J. iv. 2. 1.

but he could bring the *actio vi bonorum raptorum*. Finally, the same set of circumstances which gave rise to the *actio vi bonorum raptorum* might also afford ground for a public prosecution under the *lex Julia de vi*.

C. **Damnum injuria datum.**

In the XII Tables provision had been made for penalties for particular injuries to certain forms of property, but in the end the law of wilful or negligent damage to property came to rest on the *lex Aquilia*, which was a plebiscitum proposed by Aquilius, a tribune of the plebs, 287 B.C.[1]

The first chapter of the *lex* provided that if any one wrongfully killed a slave or a four-footed beast (being a beast reckoned among cattle) belonging to another, he should be compelled to pay the owner the greatest value of the thing at any time within the previous year. This section did not apply to wild animals or dogs, but only to animals which could properly be said to graze, as horses, mules, asses, sheep, oxen, goats, and swine. The third chapter[2] provided for wrongful damage to property, other than slaves or cattle killed, by burning, breaking or destroying ; the offender was to pay the value of the thing, not within the last year but within the last thirty days. By interpretation this too was held to be the highest value,[3] though the word *plurimi* did not appear in this chapter. Time was reckoned from the moment of the injury.

In order for a *damnum*, or loss, to fall within the statute, it had to be done *injuria* (wrongfully), for a

[1] But see Girard, 8th ed. p. 441.

[2] The second chapter dealt with *adstipulators*.

[3] In this chapter the word *plurimi* had been left out, but the opinion of the Sabinians that it was implied was adopted (G. iii. 218).

loss without a wrongful act (*damnum sine injuria*) created no legal consequences.[1] *Injuria* implied that the loss (*damnum*) was caused either wilfully (*dolus*) or by negligence (*culpa*); slight negligence sufficed.[2] So if A, in self-defence, kills B's slave, who is trying to rob him, no action will lie; nor will it if an injury is done by A, by mere accident. A is practising with a javelin and kills or injures B's slave as the slave is passing by. Here the act may be an accident, and A may therefore escape liability, or A may be negligent and liable. If A, being a soldier, practising in some place devoted to military exercise, used due care, the act is accidental. If A is not a soldier, the mere fact that he is doing a dangerous act in a public place is itself proof of negligence, and even though A is a soldier he will be liable if negligence is proved. Again, A in pruning a tree lets a bough fall and kills B's slave, who is going by. If the place is a remote one, far from the public highway, *e.g.* in the middle of A's own field, the result is probably a mere accident. If the place is a public one and A gives proper warning by calling out, there is still no liability, but if he neglects to call out, he is negligent and the action lies. Sometimes it may be negligence

[1] Though it might sometimes, in other cases, *e.g.* the quasi-delicts (p. 380).

[2] The fact that *culpa* was sufficient to give rise to the *actio legis Aquiliae* distinguished this delict from the others, where *culpa* was never sufficient; wrong-doing (*dolus*) had to be proved. On the other hand, *damnum injuria datum* has two features in common with *furtum*, *rapina*, and *injuria*; it implies the violation of a right in *rem* and imposes a penalty upon the offender. An obligation from contract, on the other hand, arises, not from the violation of a right *in rem* but from agreement of the parties, and its object is not a penalty (or a penalty and compensation), but that the person bound shall perform it or make compensation. It is only exceptionally, as in the *condictio certi*, that a penalty is imposed for non-performance.

to do nothing, as where a surgeon performs an operation upon a slave and neglects to attend to the case, so that the slave dies; but a mere omission will not do. It is negligence to undertake some profession or business and prove unskilled, *imperitia quoque culpae adnumeratur*; so a physician who causes the death of a slave by ignorantly giving him the wrong medicine is liable. In the same way a driver who, from want of skill or physical inability,[1] cannot control his horses and causes damage is liable. Slight negligence would ground liability under the *lex*, even in those cases of contract, *e.g.* deposit, where such negligence would not be a breach of contract. Contributory negligence was a good defence.

The provisions of the *lex Aquilia* were much extended both by the interpretation of the jurists and by the praetor's practice of granting an *actio utilis* or *in factum* where the case fell within the spirit, though not within the letter, of the law. The following are instances of interpretation:

(i.) The statute provided as a penalty that the sum to be recovered was not necessarily the value of the object when the wrong was done, but the greatest value at any time within the year or thirty days preceding, according as the wrong fell within the first or third chapter. So that if a slave had been blind and worthless at the moment of injury, but had only lost his sight within the period mentioned, the greater value could be recovered. But under the *lex Aquilia* it was only the greatest value of the thing standing alone which could be considered. The interpretation

[1] A man is not to blame for physical weakness alone, but a person who undertakes a task which implies a certain bodily strength may reasonably be expected to possess it.

of the jurists, however, enabled consequential damage to be included in the sum recovered ; so, *e.g.*, if a slave to whom an inheritance had been left was killed before making *aditio* at his master's order, the value of the lost inheritance could be taken into account (*lucrum cessans*). So, too, if one of a pair of horses, or the principal actor of a band of slave actors were killed, compensation could be claimed not only for the loss of the thing in question but for the diminished value of what was left (*damnum emergens*).

(ii.) The words denoting the wrongful act in the third chapter of the *lex*, *quod usserit*, *fregerit*, *ruperit*, were liberally construed, the word *ruperit*, *e.g.*, being taken to mean *corruperit*, and, accordingly, the wrong included cutting, bruising, emptying out, and spoiling of every kind.[1]

Praetorian extensions include—

(i.) The *actio legis Aquiliae* was only given by the statute to the *dominus* (or owner). The praetor enabled the *bona-fide* possessor, the *usufructuarius*, the *creditor pignoris*, in fact anyone with a right *in rem*, to sue by an *actio utilis* or *in factum* ; the exact difference between these two actions is not clear. The *colonus* who had merely a right *in rem* also had the action.

(ii.) Strictly, the *actio legis Aquiliae* had no application unless the damage were done *corpore corpori*, *i.e.* by direct bodily force to the actual object. The praetor, however, granted a parallel action (*utilis* or *in factum*) in other cases ; *e.g.* where A shuts up B's slave and causes him to die of hunger, or drives B's horse so hard as to cause it to founder, or scares his cattle so that they rush over a precipice, or persuades B's slave to mount a tree or descend a well and the

[1] G. iii. 217.

slave is killed or hurt in so doing. In one case the *actio in factum* was granted though A did no damage by his body (*corpore*) and the object itself was not harmed (*corpori*), viz. where A, through compassion, broke off the fetters of B's slave so as to enable him to escape.

(iii.) By an *actio fictitia* peregrines were brought within the scope of the *lex*.

(iv.) Not only damage to property, but to the person of a free man, gave an *actio utilis*. But the death of a freeman could not be a cause of action.

Sometimes the act which gave rise to the *actio legis Aquiliae* might also bring the wrong-doer within the range of the criminal law; *e.g.* the master of a slave who was intentionally killed might bring a capital charge against the murderer under the *lex Cornelia*.

When in the action the defendant denied his liability and failed, he was liable in double damages, *lis infitiando crescit in duplum*; and as the action was penal, if the damage were caused by more persons than one, the whole sum could be recovered separately against each offender.

D. Injuria.

Justinian says that the term *injuria* has several meanings—

(i.) Any illegal act (*omne quod non jure fit*).

(ii.) The wrong done by a judge who pronounces an unjust sentence.

(iii.) An act implying *dolus* or *culpa*, as in the last-mentioned delict; and

(iv.) As equivalent to the Greek ὕβρις, *i.e.* any insulting act, one that is primarily injurious to a man's dignity.

It is in the last sense that the word is used as

denoting the delict *injuria*. *Injuria*, as a specific wrong, was, in fact, any wilful violation of the right of a freeman to safety and reputation. The possible wrongs covered are very wide, for *injuria* includes not merely assault, but libel and slander, which, with us, are separate delicts. The essence of the delict appears to be a contemptuous disregard of another's dignity tending to cause loss of repute, and deliberately intended to produce this result. The following examples of *injuria* are found in the *Institutes*: wounding or beating with the fist or a club; taking a man's goods in execution for a debt which does not exist, *i.e.* suggesting that he is insolvent; composing or publishing defamatory writing or verses; following a woman of honest character or a young person (so as to imply that they are persons of frail character); and an attempt upon chastity.

The action was said to be *vindictam spirans*, hence it could be brought by several persons in respect of the same act. A insults B, who is the wife of C, and the daughter and under the power of D. All three might bring the action: B because the action was one of the few actions which persons in *potestas* could bring in their own names; C because, though B is not *in manu*, an intention to insult him is presumed; and D because he has been insulted in the person of someone in his power. A slave, however, could never bring the *actio injuriarum*, and his master only when the act was of so grave a character as to show that an insult to the master was intended, as where one man flogged or tortured another's slave.[1] If the slave were held in common, the injury was estimated not in

[1] But if the *injuria* diminished the value of the slave the master could sue under the *lex Aquilia*.

accordance with the shares of the masters, but having regard to their respective positions. Where a slave was in usufruct, the insult was presumed to be intended for the *dominus*, not the *usufructuarius* ; but the presumption might be rebutted, *i.e.* the latter might be able to show that the wrong had, in fact, been aimed at him. Where the *injuria* was done to a *bona-fide serviens* the supposed master had no action unless he could prove that the wrong was solely to insult him, but, in any case, the *bona-fide serviens* could sue in his own name. In the case of insult to a corpse or funeral, the insult was to the heir, if he had already entered, if not, to the *hereditas*, and so acquired by the heir after entry.

The remedies given by the XII Tables for acts amounting to *injuria* were : for broken limbs, retaliation ; for broken bones a penalty of 300 *asses*, if the person injured was a freeman, 150 if a slave ; for other injuries 25 *asses*. It followed that the grossest insult could be atoned for by a payment of 25 *asses* under the XII Tables. This sum had become derisory as a deterrent owing to the change in the value of money, and there is a story of one L. Veratius whose recreation took the form of walking about the streets and striking people in the face ; he was followed by a slave with a tray full of *asses*, which he distributed, according to the law of the XII Tables, among his master's victims. The praetor, accordingly, introduced the *actio injuriarum*, under which the plaintiff was allowed to fix his own damages, the judge having power to reduce them if he thought them excessive, and this continued to be the practice in the time of Justinian, the damages being calculated after considering the nature of the *injuria*, the character of

the person injured, and the surrounding circumstances generally. In particular, the damages might be greatly augmented if the wrong amounted to that species of *injuria* which was known as *atrox*.[1] An insult (*injuria*) might be *atrox*—

(1) *Ex facto*, by reason of the nature of the act, as where a man was beaten with clubs.

(2) *Ex loco*, by reason of the place where the injury was done, as in the forum or a theatre, or in the presence of the praetor.

(3) *Ex loco vulneris*, because of the part of the body injured, *e.g.* the eye ; or

(4) *Ex persona*, by reason of the dignity of the person subjected to the injury ; *e.g.* when a magistrate or senator was attacked, or where an ascendant or patron was wronged by a descendant or freedman.

The *actio injuriarum* lay not only against principals but accessories to the act ;[2] it was an *actio vindictam spirans*, *i.e.* its object was to secure personal satisfaction, and being also *poenalis*, it did not pass to or against the heirs of either party. It was barred by *dissimulatio*, *i.e.* a man who failed to show immediate resentment was taken to acquiesce in the wrong done him, and could not afterwards bring the action. And, in any case, the praetorian *actio injuriarum* had to be brought within a year.

Finally, in every case of *injuria* the person wronged could elect between the civil action or a criminal prosecution ; *e.g.* under the *lex Cornelia*, 81 B.C., and under this law a distinct civil remedy came to be

[1] In the time of Gaius it often happened, in the case of *atrox injuria*, that the praetor indirectly decided the amount of the penalty when he fixed the bail (*vadimonium*) ; for the plaintiff usually took this as the sum to claim, and the *judex*, though not bound to allow the full amount, usually did so in deference to the praetor (G. iii. 224). [2] J. iv. 4. 11.

developed (in addition to the praetorian *actio injuriarum*), which was not barred in a year.[1] A constitution of Zeno allowed men of high rank (*illustres*) to bring or defend the criminal action by an agent (procurator).

Some delicts introduced by the praetor.

The *Institutes* only mention the four already considered, but there were others which were omitted as being inappropriate to an elementary text-book, or because it conflicted with the fourfold classification which is conspicuous in this part of the law.

1. *Dolus.*—This consists in wilful conduct in the nature of fraud or trickery with a view to deriving some unfair advantage over another. Where it induced another to act to his detriment there might be a *restitutio in integrum*; such a grant barred any *actio doli*. This was a penal action, available to, but not against, the *heres*, but being praetorian it had to be brought within an *annus utilis*. It lay to make good the damage, but only against the wrong-doer, and only in the absence of any other remedy, as it was infaming. *Dolus* as a distinct delict must not be confused with *dolus* as a ground of liability in certain delicts, where it means wilful intent, as in the action of *injuria*; here *dolus* is merely a ground of liability in some other wrong, and meant that that wrong was committed wilfully.

2. *Metus.*—Where a person under duress had entered into some legal transaction to his detriment, then if that transaction had not been completed, *e.g.* a contract to sell a slave, and an action were brought to enforce it, an *exceptio metus* was available. If the transaction had been carried out, *e.g.* the slave had been handed over, a *restitutio in integrum* could be

[1] J. iv. 4. 8. This action could be brought by anyone struck or beaten, or whose house had been broken into.

sought. Failing restoration, the *actio quod metus causa* could be brought for fourfold damages against the wrong-doer or anybody else who had profited by the transaction, but in the latter case only for the actual profit: as in the *actio doli*, there could be no condemnation where there was restoration. The duress must consist in threats of death or grave bodily injury, enslavement, an attack on chastity, or a capital charge against the plaintiff or the members of his family. In other respects it resembled the *actio doli*, being *annua*, available to, but not against, the *heres*, except that we are not told that it was infaming.

3. *Servi corruptio.*—A person who wilfully brought about the deterioration of a slave, whether in respect of his body, mind, or character, was liable to an *actio servi corrupti*, which, unlike the above two, was noxal and perpetual, but like them, being penal, was available to, but not against, the *heres*. Justinian allowed an attempt to corrupt a slave, though unsuccessful, to found the action.

Subsect. 5. Obligations arising quasi ex delicto

In certain exceptional cases, on grounds of public policy, one man is made liable vicariously for a wrong committed by another. This case of the judge does not, at first sight, fall within this principle, but it is really also a case of vicarious liability, since the judge by his unjust judgment takes upon himself the liability for the wrong done.[1] Justinian gives the following examples:

1. *Judex qui litem suam fecerit.*—A judge could be sued for damages (the amount to be decided by the

[1] Buckland, p. 594.

judge at the subsequent trial) if the former ' made the cause his own ', *i.e.* gave an unjust sentence by negligence or bad faith, or failed to appear on the day appointed for judgment.[1]

2. *Actio de effusis vel dejectis.* — Under this, a praetorian action, the householder of a house abutting on a highway could be rendered liable for anything thrown or poured out from the house to the injury of another, though the act had been done without his knowledge or consent. The action was for double the amount of the damage done, and if a freeman had been killed there was a penalty of fifty *solidi* ; if, however, the freeman were not killed, but merely hurt, the judge assessed the damages, taking into account medical expenses, loss of employment, etc. The action, if a freeman had been killed, was *popularis*, *i.e.* could be brought by a common informer.

3. The *actio de positis vel suspensis*, also of praetorian origin, lay against a person who kept something placed or suspended from his house over a public way, which fell, causing damage to a passer-by. The action was *popularis*, the penalty being ten *solidi*.[2]

4. The master of a ship, or an inn, or a public stable, by a praetorian action, was liable for double the damage occasioned to a customer on the premises by the theft or fraud (*dolus*) of anyone in his service.

In the first of these quasi-delicts, the judge who is guilty of *dolus malus* or negligence has really committed an actual wrong, and his obligation is termed

[1] In England a judge of the High Court cannot be sued for anything done in his judicial capacity, though *mala fides* is expressly alleged.

[2] If a *filius*, living apart from his father, came within the principle of these three quasi-delicts, action could not be brought against the father, but only against the *filius*. But in the case of a quasi-delict committed by a slave a noxal action lay against his master.

quasi-delictal merely because the case does not come within any one of the classes of the recognised delicts. In the other cases, however, the obligation may arise without any kind of fault (*culpa*) on the part of the person liable. However carefully he may fix something to his window, he is liable if it falls, as he is liable for the acts of his servants and of those who gain access to his rooms. Justinian justifies the rule in the case of servants by saying that the master is in fault in employing bad servants, but it does not appear that he could escape liability by proving that he had used every care to select the best. The truth seems to be that cases must always arise [1] where there is a *damnum*, or loss, to one person, without a definite wrong (*injuria*) on the part of another, to make the loss actionable. Sometimes the loss remains without redress; sometimes liability may be imposed and justified on grounds of public policy.

Subsect. 6. The Transfer and Discharge [2] of Delictal Rights and Liabilities

Transfer of delictal rights and liabilities.—What has been said already with regard to the transfer of the rights and liabilities of a contract is, for the most part, applicable here also. The wrong-doer could never escape liability by attempting to assign his obligation to another, while a capital penalty (*e.g.* for *furtum*

[1] As in questions of employers' liability in English law.

[2] It is not clear whether Gaius and Justinian, in describing the methods by which obligations are extinguished, aim at explaining how all obligations may be discharged, or intend to confine their remarks to contractual obligations. The latter view seems probable, both because some of the methods of extinction (*e.g. contrarius actus*) can only apply to contract, and also because the subject is dealt with immediately after contract and before delict.

manifestum) could, obviously, not be assigned, even with the consent of the person wronged. In cases, however, where a delict had conferred upon the injured person a right to receive some definite money payment, he might, if he wished, allow the debtor to substitute some other person who promised to make payment, and then take a stipulation from him; whereupon the liability of the wrong-doer would be extinguished and transferred by novation. Conversely, the right to receive a money payment for a wrong might be transferred by the person wronged to another, subject to the same limitations, as in the case of the transfer of the benefit under a contract.

The discharge of delict.—The above description of the methods of discharging contract applies also, to some extent, to the extinction of obligations arising out of wrong. Discharge by pardon may, however, be regarded as a method of discharge peculiar to delict, while, on the other hand, there could be no question of the obligation being extinguished by *contrarius actus*, by subsequent impossibility, or by *capitis deminutio* (*nemo delictis exuitur quamvis capite minutus sit*). It may be said, therefore, that an obligation arising *ex delicto* ended by pardon, performance, novation, operation of law, death, and *ope exceptionis*.

1. *Pardon.*—In the case of an obligation arising from *injuria*, a pardon might be implied by *dissimulatio*. In other cases it had to be express, though a mere *pactum de non petendo* was enough. A formal pardon would be effected by novating the obligation by a stipulation, and then releasing it by *acceptilatio*.

2. *Performance, i.e.* payment of the penalty, or of the penalty and compensation, and

3. *Novation* seem to be methods of dissolving

obligation common both to those springing from agreement and from wrong.

4. A delictal obligation might end *by operation of law*—(*a*) by *litis contestatio* in the time of Gaius; (*b*) by lapse of time, and this far more easily than in the case of contractual obligations; the *actio injuriarum*, *e.g.*, was barred if not brought within a year, as were all the praetorian actions for delict; but the *actio furti* was perpetual, being a civil law action, and the *actio vi bonorum raptorum*, though barred by a year in respect of the fourfold penalty, survived after that period for single damages; (*c*) *merger* or *confusio*.[1]

5. *Death* has a much wider effect in extinguishing obligation from wrong. Gaius states that one of the most settled rules of law was that penal actions springing from delict, such as those arising from *furtum*, *rapina*, *damnum*, *injuria datum*, and *injuria*, were not granted against the heir of the person who committed the delict;[2] but a rule was introduced about the beginning of the Empire that the estate of the wrong-doer could be made liable so far as enriched by the delict; and the *condictio furtiva*, not being an action for a penalty, could, in any case, be brought against the heirs of the thief. On the other hand, a delictal obligation affecting property was not extinguished by the death of the person injured, for, as stated in the *Institutes*,[3] his heir could bring an action, unless the delict in question were *injuria* where property was not concerned.[4]

6. *Ope exceptionis.*—An example would be the *exceptio pacti de non petendo*.

[1] P. 359. [2] G. iv. 112. [3] G. *loc. cit.*; J. iv. 12. 1.

[4] A claim by an ascendant or patron against his descendant or freedman who had sued him without the *praetor's* leave, also lapsed by the death of the person injured.

PART III

ACTIONS

Though it is impossible to trace any very scientific plan in the treatment by Gaius and Justinian of the law of actions, it is clear that they use the term action in two distinct senses, sometimes to denote the right a man has to the assistance of the Courts when an existing right has been infringed, and at others to describe the procedure by which the remedial right is enforced.[1] It is mainly with the latter that they are concerned, though in their treatment, which is hardly logical, they often treat of rights, rather than remedies. It is proposed to deal with the subject as follows:

I. General view.
II. Division of actions.
III. *Compensatio* and *deductio*. *Plus petitio*.
IV. *Actiones adjectitiae qualitatis*, *noxal actions*, and *pauperies*.
V. Pretorian remedies.
VI. Modes of execution.
VII. Restraints on vexatious litigation.

[1] A right, as such, *i.e.* apart from infringement, whether *in rem* or *in personam*, is sometimes called a substantive right, which, after infringement, gives rise to another or *remedial* right, viz. to the assistance of the law. In so far as remedial rights are described in the law of actions, and in so far as the corresponding substantive rights are not dealt with in the earlier part of the *Institutes*, the law of actions may be regarded as indirectly explaining some substantive law, *e.g.* that part of agency which depends upon the *actiones adjectitiae qualitatis*.

Section I. General View

The manner in which legal procedure was conducted at Rome varied from time to time; originally it was by means of a *legis actio*; in the time of Gaius it was conducted under the formulary system, which, in turn, was replaced by the system of *extraordinaria judicia*. The three methods will be considered in detail.

Subsect. 1. The Legis Actiones

There is a time in nearly every community when there are no courts, when there is no settled law; when might is right, and the remedy an individual has for a wrong done to him, or to his family or goods, is that which he can secure for himself, *e.g.* by killing or otherwise injuring the offender, or, by a foray, depriving him of his possessions, *e.g.* his wife or his cattle. In a progressive society this period is followed by a time when self-redress still prevails, but has come to some extent within the control of the State; private vengeance is still seen, but it is taken under State regulation. This jurisdiction the State (as at Rome) may obtain, either by offering to the injured party (as in the *actio furti manifesti*) at least as effective a revenge as he could himself obtain, or by inducing him to submit the dispute to some indifferent third person.[1] Later comes the period when the State asserts sole jurisdiction, and punishes a wrong (whether arising from delict or consisting in mere breach of contract), without any regard to the consideration

[1] This may account for the fact that for so many centuries the judge at Rome was not a magistrate or State official, but a private individual.

that if the person injured is not satisfied he may take the law into his own hands ; for the State has become strong enough to punish him if he tries to do so. This period had been reached at Rome, for all practical purposes,[1] many years before the time of Gaius ; but with a lawyer's regard for antiquity, Gaius describes an older procedure, which consisted of five methods (*legis actiones*),[2] in three of which a dispute could be withdrawn by the magistrate (*in jure*) from the possibility of violent settlement, and submitted to the decision of a private individual (*in judicio*), while in the other two regulated self-help was permitted.

The characteristics of the *legis actio* system, where the matter led to litigation, were that both parties appeared before the praetor and each formulated his claim (or denial) with ceremonial words and actions, prescribed by some *lex*, or derived therefrom by the interpretation of the pontifical lawyers. Any slip in the language or the ritual accompanying it was fatal to the proceeding, which could not again be renewed. On the other hand if these preliminaries were performed as prescribed by law, the right to have the matter submitted to arbitration was secured and some private person (*judex*) or persons (*arbitri*) were appointed from a list called the *album judicum* to whom the decision of the matter was entrusted. Here the proceedings before the praetor (*in jure*) ended. After an interval, in which the parties might come to terms, the hearing took place before the *judex* or *arbitri* (*in judicio*), who terminated the matter by

[1] Though some forms of private violence were only finally abolished by the constitution of Theodosius, Valentinian, and Arcadius, A.D. 389.

[2] Gaius uses the term *legis actio* in two senses—(*a*) as above, to denote a method of procedure ; (*b*) as denoting a particular remedy, *e.g.* the *actio arborum furtim caesarum* (cf. Muirhead, Gaius, p. 269).

their *sententia* or opinion, and, if this were in favour of the plaintiff, it was for him to take the necessary steps to arrest the defendant (*manus injectio*), who might even be sold into slavery in default of satisfying the judgment. The term *legis actio* does not necessarily imply a litigation, though this is the modern meaning of the term *actio*, and much misplaced ingenuity has been brought to bear to try to show that every one of these proceedings might, at any rate, lead to litigation. This is to import modern notions into ancient times. Our real aim ought to be to understand what the Romans meant by the term *actio*, and since two of the *legis actiones* need not be in Court,[1] being merely forms of regulated self-help, the probability is that the term *legis actio* means a procedure based upon or recognised by statute as a remedy for wrongs, whether it amounts to a litigation or not.

The *legis actiones* were five in number:

(*a*) *Sacramentum.*
(*b*) *Judicis postulatio.*
(*c*) *Condictio.*
(*d*) *Manus injectio.*
(*e*) *Pignoris capio.*

(*a*) *Sacramentum.*

This was applicable where no other form was appointed by statute both to claims *in rem* and *in personam*. Where it took the form of an action *in rem*, the proceedings were as follows: the plaintiff secured the presence of the defendant in Court, the XII Tables entitling him, if the defendant refused to

[1] *I.e.* before the magistrate.

come, to bring him by force, and the object in dispute (*e.g.* the slave) had also to be there.[1] The plaintiff then, holding a wand (*vindicta* or *festuca*) in one hand, seized the object with the other and claimed ownership, '*Hunc ego hominem ex jure Quiritium meum esse aio secundum suam causam sicut dixi; ecce tibi vindictam imposui*' (I claim this man in Quiritary right, according to the claim I have already explained,[2] behold, I have laid my wand upon him); and the plaintiff accordingly placed his wand upon the slave in token of ownership. Thereupon the defendant went through exactly the same ceremony, and used the same words, and then the praetor ordered them both to release the slave: '*Mittite ambo hominem*', which they did.[3] The plaintiff next asked for the defendant's title: '*Postulo anne dicas qua ex causa vindicaveris*', the defendant's reply being a general assertion of ownership, '*Jus feci sicut vindictam imposui*' (I did right as I laid my wand upon the object). Whereupon the plaintiff denied the right, and challenged the defendant to a bet, '*Quando tu injuria vindicavisti, D aeris*[4] *sacramento te provoco*', and the defendant made a like challenge, '*Et ego te*'. The praetor then[5]—

[1] If this was impossible, *e.g.* the object were land or a house, some part of it, such as a clod, was later brought by way of symbol; originally no doubt the claim was made on the land itself.

[2] *I.e.* before the appearance in Court. But see Muirhead, Gaius, p. 274.

[3] Sir H. Maine (*Ancient Law*, p. 376) sees in this the dramatisation of the origin of justice. In the earliest times two men are disputing ownership, armed not with wands but with spears (*hastae*), which the wands in a later period represented. A *vir pietate gravis* passing by *regit dictis animos et pectora mulcet*, and induces them to make a bet on the dispute, and submit the question to an arbitrator.

[4] 500 of bronze. But see Muirhead, Gaius, 275, iv. 7.

[5] Some further proceedings, as in a personal action, seem to have taken place before the *praetor's* award (G. iv. 16).

(*a*) Awarded possession of the slave to one of the parties pending the trial (*vindicias dicebat*).

(*b*) Required the person so given possession to give security to his adversary that if he lost the case he would restore the thing and its profits to him (*praedes litis et vindiciarum*); and

(*c*) Required both parties to give security (by sureties who gave a pledge of lands) for the amount of the bet. The person who, in the result, lost the bet forfeited it, at first, to the priests, later to the State; and originally, it seems, the wagers were actually deposited with the *pontifex*, so that security for payment was then unnecessary. The amount of the wager (*sacramentum*) was 500 *asses*, unless the thing in dispute were of less value than 1000 *asses*, or the action was to determine whether a man was free or a slave, in both of which cases it was 50 *asses* only.

Ultimately the trial before the *judex*,[1] which it was the sole object of the above cumbrous proceedings to secure, took place. A *lex Pinaria* allowed an interval of thirty days before he was appointed. On his appointment the parties (whether the action was real or personal)[2] gave notice of trial for the next day but one, and at the trial each first explained shortly the main points of his case (*causae conjectio*), then the evidence was gone into, and finally the judge determined who was the real owner; though this was

[1] Though a single *judex* is here (and elsewhere) spoken of, proceedings *in judicio* might take place before several judges. In certain real actions (*e.g. hereditatis vindicatio*) the trial was before the Court of *centumviri*; and the *praetor*, by virtue of his *imperium*, might appoint a small committee of citizens as judges, the committee usually consisting of three or five members, who were known as *recuperatores*.

[2] Little is known of the early proceedings in the *legis actio sacramenti in personam*.

only implied by his *sententia* which was to the effect that the *sacramentum* of one of the parties was *injustum*.[1]

(*b*) *Judicis postulatio.*

Of the *legis actio per judicis postulationem* nothing is really known, for that part of the MS. of Gaius which related to it is indecipherable. It is conjectured that where some right of the plaintiff had been infringed, with the result that he claimed unliquidated damages, he could obtain a *judicium* by affirming the state of facts which gave rise to his right before the magistrate (*in jure*), and then claiming to have a judge or arbiters appointed: '*Te praetor judicem arbitrumve postulo uti des*'. The term 'unliquidated damages' means that the plaintiff claims not an ascertained (liquidated) sum, such as fifty *aurei* promised by a stipulation, but an unascertained sum, such as compensation through loss of business, or the like, which it was for the judge or arbiters to arrive at.[2]

(*c*) *Condictio.*

The *legis actio per condictionem* was that form of process (*legis actio*) under which the plaintiff obtained a *judicium* by giving notice [3] to the defendant, requiring the defendant to appear before the magistrate on the thirtieth day from the notice, to have a *judex* appointed. The account given by Gaius is not at all detailed, but it appears that it was a personal action introduced by a *lex Silia* in the case of claims for a definite money payment, and that the *lex Calpurnia*

[1] For the form of the *sacramentum in personam*, see Buckland, p. 607, and Muirhead, p. 178.

[2] See Buckland, p. 612, and Muirhead, p. 179.

[3] Hence the name; *Condicere est denuntiare . . . itaque haec quidem actio proprie condictio vocabatur; nam actor* (the plaintiff) *adversario denuntiabat ut ad judicem capiendum die xxx adesset* (G. iv. 18).

extended it to the recovery of any other certain thing, *lege quidem Silia certae pecuniae, lege vero Calpurnia de omni certa re.*

The proceedings, probably, were as follows: The plaintiff obtained the presence of the defendant before the magistrate, stated his claim, which was denied by the defendant, and then, if the claim was for money (*e lege Silia*), the parties, at the plaintiff's suggestion, mutually agreed [1] that the person whose claim proved unfounded should give the other not merely the sum or thing in dispute, but one-third of its value as well. In other words, there was a wager, as in the case of the *sacramentum*, but the wager went to the party who proved successful and not to the State. After this the plaintiff founded his right to a trial by requiring the defendant to appear on the thirtieth day to have a *judex* appointed.[2] At the end of the time the plaintiff became absolutely entitled on application to the magistrate to have the *judex* appointed, and the trial proceeded in the ordinary manner.

Gaius remarks that it is not very clear why it should have been necessary to establish this particular *legis actio*, because a claim could equally well have been enforced by the two other methods. The most probable explanation is that it afforded creditors a simpler remedy than that given them by the *sacramentum*, and a more effective one than that provided either by this last-named *actio* or the *judicis postulatio*, viz. the amount of their claim together with a third as penalty.

When the *legis actiones* had become fully developed it is not unlikely, as Mr. Poste suggests,[3] that the

[1] By a *sponsio poenalis* on the part of the defendant, followed by a *restipulatio* by the plaintiff. This may have been made before the judge.

[2] It is possible that, at a later period, the wagers and the *condictio* took place out of Court.

[3] P. 463.

sacramentum was practically confined to real actions before the *centumviri*; *condictio* applied to claims on a *mutuum*, a stipulation for some definite sum or thing and to money due on a literal contract; while the *judicis postulatio* might be the personal action for unliquidated claims, *e.g.* on a stipulation of uncertain value, such as one to perform services.

(*d*) *Manus injectio.*

Originally *manus injectio* had no necessary connection with an action; it was a method of execution upon the person, *i.e.* the creditor took the body of the debtor in satisfaction of his claim, as authorised by the XII Tables; which in effect provided that a man who either had admitted that he owed another money (*confessus debitor*), or had been adjudged liable to pay by the court (*judicatus*), should have thirty days in which to pay. At the end of that time the creditor might lay hands (*manus injectio*) upon the debtor and take him before the magistrate. The debtor could not resist the arrest himself. If the debtor did not pay the debt and no one opposed the claim on his behalf,[1] the magistrate pronounced him *addictus* and the plaintiff took him away, put him in a private prison, and provided him with food daily. This continued for sixty days, and on three consecutive market days the plaintiff had to produce the debtor publicly and proclaim the amount due. Failing satisfaction the debtor, on the last of these days, could, according to the strictly literal rendering of the XII Tables, be killed (*capite poenas dabat*) or sold as a slave *trans Tiberim.* If there were several creditors they

[1] The debtor could not personally defend, being reduced by *manus injectio* to quasi-slavery; if he had any answer it had to be made by another (*vindex*).

could cut the debtor up and divide him between them.[1]

This method of execution was practically obsolete in the time of Gaius, but he gives a brief account of what looks like its developed form. The plaintiff, according to Gaius, after stating that the defendant was condemned to pay him so much money, announced that he arrested him for it, at the same time seizing his body.[2] The debtor was not allowed to resist arrest or to defend the claim personally, and, if he failed to secure a *vindex* to defend the action for him (or to pay the debt), he became *debitor addictus* to the creditor, who took him home to the family dungeon. Gaius gives no description of the subsequent proceedings, and his statement, so far as it goes, corresponds substantially with the provision of the XII Tables. If a *vindex* intervened, the debtor was released, and proceedings taken against the *vindex*, who, if he failed to justify his intervention, was cast in double damages. Gaius tells us that *manus injectio*, at first confined to the *confessus* and *judicatus*, was afterwards extended not only to persons placed by law in the position of judgment debtors (*pro judicatis*), but to other cases (*manus injectio pura*). The *lex Publilia*, *e.g.*, gave *manus injectio* to a surety who had paid the debt, against the principal debtor unless repaid by him in six months, and the *lex Furia de sponsu* allowed it against a creditor who had exacted more than a pro-

[1] Another form of *manus injectio* under the XII Tables was where a plaintiff, before witnesses, arrested a defendant in order to secure his presence before the magistrate.

[2] Possibly before the magistrate, but Gaius does not expressly affirm this, and there is some ground for thinking that *manus injectio* took place out of court, and that the debtor was adjudged to the creditor by the magistrate subsequently.

portionate share of his debt from one of several sponsors. Similarly, *manus injectio pura* (*i.e.* in cases other than where given against *pro judicatis*) was granted under the *lex Furia testamentaria* against legatees who received more than 1000 *asses* from a testator, and by the *lex Marcia* against usurers who had exacted interest on a loan. If *manus injectio* had continued as a mere form of execution, it is extremely unlikely that so barbarous a remedy (even as modified by the *lex Poetelia*[1]) would have been extended to cases not already covered by it, and it is almost inconceivable that a legislative body should have been at once so humane as to come to the assistance of the sponsor whose bad bargain had placed him in an unlucky position, but in no sort of vital danger, and yet so heartless as to find a remedy for him by subjecting the other party to one of the most savage legal institutions on record. Moreover, Gaius expressly states that after the *lex Vallia* every person so sued (*cum quibus per manus injectionem agebatur*) could resist arrest and personally defend the action, except the judgment debtor and the principal indebted to his sponsor. The irresistible conclusion, therefore, is that in its developed form *manus injectio* was a remedy of two different kinds. If the debtor had no defence and could not satisfy the creditor, it was execution; if he had a defence *manus injectio* led to a *legis actio* tried before a *judex*, the action being defended by the debtor in person in all save the two excepted cases.

(*e*) *Pignoris capio.*

The *legis actio per pignoris capionem* almost certainly never amounted to an action in the ordinary sense, *i.e.* a means of obtaining a trial before a *judex*.

[1] P. 445.

As described by Gaius (though it was obsolete in his time), *pignoris capio* was execution, not on the debtor's person, but upon his property, the nearest English term being 'distress'. Gaius says it was employed in some cases by custom, in others by statute.[1] By custom, *pignoris capio* was granted to soldiers against the persons liable to provide either their pay (*aes militare*), or money to buy a horse (*aes equestre*), or money to buy fodder for the horse (*aes hordiarium*). By statute, the remedy lay, in default of payment, against (i.) the purchaser of a victim for sacrifice; and (ii.) the hirer of a beast of burden (*jumentum*), which had been let to him to raise money for an offering to Jupiter Dapalis, which money had not been paid. Further, the censor allowed a farmer of the public revenue (*publicanus*) to use *pignoris capio* against persons who failed to pay their taxes.

Since, in all these cases, the person who made the distress had to use a set form of words (*certis verbis pignus capiebatur*), Gaius says the proceeding was generally considered a form of *legis actio*; but that others thought that it was not so, being performed in the absence of the praetor and often of the other party, whereas a *legis actio* proper took place in the presence both of the praetor and the defendant;[2] and, further, because *pignoris capio* could be made even on a *dies nefastus*, when a *legis actio* was impossible.

It will be noticed that *pignoris capio* means literally 'the taking of a pledge,' *i.e.* security for payment, and Gaius does not state what was to happen on failure of payment. Possibly the pledge thereupon

[1] *I.e.* the XII Tables.

[2] A statement which supports the theory that the developed form of *manus injectio* took place in Court.

became the absolute property of the distrainor, *i.e.* free from any right on the part of the debtor to redeem the pledge by subsequent payment. But it is possible that, where the debtor disputed his liability, the distrainor applied to the magistrate for a judge to decide the case, in which case *pignoris capio* might lead to a *legis actio* in the other sense ; and inasmuch as the act necessarily took place out of Court, the objections, which Gaius mentions, would not have much weight ; for the application to the magistrate for the appointment of a *judex*, to which the plaintiff was entitled by his extra-judicial *legis actio*, could be made on a subsequent *dies fastus*, and in the presence of all parties. This conjecture is ingenious, but the probability is that *pignoris capio* was given in these cases because there was no other remedy.[1] The cases given affect the State or the State religion, and, since there could be no action against the State, hence *pignoris capio* was permitted. The two cases affecting religion are informal contracts which could not have formed a basis for an action in early law.[2]

Subsect. 2. The Formulary System

(*a*) *The introduction of the system.*

The chief defects of the *legis actio* system were as follows—

(i.) Its extreme technicality (*nimia subtilitas*) : a litigant, however strong the merits of his case might be, failed altogether by making even the slightest mistake in procedure. It was, as Gaius points out,[3] necessary for him to keep exactly within the terms of

[1] See Buckland, pp. 620-621.
[2] G. iv. 32. [3] G. iv. 11.

the law which gave him the right he was asserting; so, if the precise legal right were to proceed against another for cutting down trees (*arbores*), the plaintiff who sued a man for cutting down his vines (*vites*) failed, if he so termed them in his pleading. The jurists held that vines came within the words of the XII Tables, which gave the action *de arboribus succisis*; but the letter of the law must be adhered to, and to claim successfully the benefit of the interpretation, *vites* must be described as *arbores*.

(ii.) Once the solemn words of the *legis actio* had been pronounced *in jure*, and the issue between the parties so formulated, the proceedings reached what was called *litis contestatio*,[1] which had the effect of wholly destroying the plaintiff's original right of action; thenceforth he could rely solely on his new right, that the trial should be undertaken by a *judex*, and the defendant, if in the wrong, condemned. From this it followed that failure to keep within the letter of the law during the procedure *in jure*, meant not only that the particular action must fail, but that the right to sue at all had gone for ever. The original right was extinguished by *litis contestatio*, and the new right to have a trial failed, being based on a defective *legis actio*.

(iii.) The system was incapable of adequate expansion. In theory no right could be enforced by a *legis actio* unless it came within the letter of some existing law; and though the early jurists did something to remedy this, it was, obviously, only possible by interpretation to deal with cases that were in some sense analogous; so that no right which was substantially a new right could obtain any sort of recognition,

[1] Cf. the English term 'joinder of issue'.

however much such recognition might be desirable, having regard to the increasing complexity of affairs.

Hence, Gaius says, *legis actiones* were, save in two cases, abolished by the *lex Aebutia* and two *leges Juliae*, in favour of litigation by certain forms of words or *formulae, per concepta verba, id est per formulas*, and he states that the excepted cases were *damnum infectum* and cases before the *centumviri*. This is a somewhat bare account of a lengthy and interesting development.

The essence of a proceeding by *legis actio* was that by means of the words and acts of a *legis actio* an issue was arrived at before the praetor (*in jure*), which the plaintiff was entitled to have tried, *in judicio*, by a *judex*. In the formulary period the distinction between *in jure* and *in judicio* remained, but *litis contestatio* was reached, and the subsequent *judicium* obtained, not because the forms of a *legis actio* had been complied with, but because of a formula, selected from among those set out in the praetorian edict, and perhaps modified by the praetor to suit the particular case (*concepta verba*), naming a *judex*, and briefly describing the point to be tried, and the allegations of the parties. In other words, the trial arose on grounds set forward by the praetor and embodied in a formula set out in the edict.

The most probable theory with regard to the source of this second system of procedure is, that it was originated by the *praetor peregrinus* in relation to foreigners. A suit by *legis actio* was a *judicium legitimum*, and, as such, only available for and against Roman citizens. When, therefore, the *praetor peregrinus* (242 B.C.) began to evolve his rules drawn from *jus gentium* for cases where one or both parties were

peregrini, it was necessary for him to find some procedure by which the actions could be tried. He might, of course, by virtue of his *imperium*, have anticipated the later *extraordinaria judicia* by trying the case outright himself. A more obvious and conservative course, however, was adopted; for, modelling his procedure on that of the *praetor urbanus*, the *praetor peregrinus* appointed, not, it is true, a single judge, as was usual at *jus civile*, but several *recuperatores* to try the issue; which, as it could not rest on any *lex*, the praetor, on his own authority, defined for them at the time of their appointment. If, after hearing the evidence, the judges held that the facts alleged by the plaintiff (*e.g.* that he had been struck without cause by the defendant) were proved, the defendant was to be condemned, otherwise he was to be acquitted. The order appointing the judges, and stating the issue for them to try, was soon termed the *formula*, being drawn up in accordance with the set forms (*concepta verba*) which the praetor had announced in his edict, and a trial conducted in this way was known as a *judicium imperio continens* (resting on the authority of the praetor), as distinguished from a *judicium legitimum*, *i.e.* one for citizens, and resting on a *lex*.

The obvious advantage of starting an action by a simple formula, capable of adaptation to any set of circumstances, must have been apparent enough to the *praetor urbanus*, and would probably have been adopted in his court at a much earlier stage than it was but for the fact that such a course would have produced strong opposition from the Pontifical College, who had always been closely associated with the earlier procedure. In the end, however, legislation

was resorted to, with the result, as Gaius says, that the *legis actio* system became displaced by its more scientific rival. The first *lex*,[1] the *lex Aebutia* (about 149–126 B.C.), allowed litigants before the *praetor urbanus* to proceed at their option either by means of a *legis actio* or by *formula*. So that thenceforth a *judicium*, even though produced by formula only, might be a *judicium legitimum*, provided the other requirements of such a trial (viz. that there was one *judex* only, that the parties were citizens, and that the trial took place within the first milestone from Rome) were satisfied. The first *lex Julia*[2] abolished the alternative procedure, and made action by formula compulsory in all cases, except those before the *centumviri* and *damnum infectum*, while the second *lex Julia* made the same reform for municipalities outside Rome.

After the *leges Juliae*, therefore, the formulary system was absolutely established, save in the two cases mentioned by Gaius, and save in what is called the praetor's 'voluntary jurisdiction'. The *legis actio* survived in centumviral cases (*i.e.* all cases of quiritary right) because, there being already a court (*i.e.* the *centumviri*) to try such actions, it would be unnecessary and improper for the praetor to appoint a *judex* or devise a *formula*; and actions were still tried by *sacramentum* before the *centumviri* as late as Diocletian. In the other two cases[3] the appointment of a *judex* and the use of formulae were also unnecessary. *Damnum infectum*, under the *legis actio* system, secured protection to a person threatened with damage

[1] There is no certainty about the actual provisions of any of the three laws. See generally on the subject Wlassak, *Processgesetze*.

[2] Both were probably passed about 17 B.C.

[3] *I.e. damnum infectum* and the voluntary jurisdiction.

by means of *pignoris capio*,[1] so that it usually did not involve any trial. Hence a formula was not required and *damnum infectum* in theory survived as a *legis actio*; though, as Gaius says, no one thought of proceeding in this way in his time (when the formulary system was in full vigour), for it was infinitely better to require the person from whose property danger was feared to enter into a stipulation before the praetor. Finally, the 'voluntary jurisdiction' of the praetor, which chiefly consisted in being present at adoptions, manumissions, emancipations, and *in jure cessio* generally, never involved a real trial. In all these cases of fictitious lawsuits one party admitted the right of the other *in jure*, and there the proceedings came to an end. As in *damnum infectum*, therefore, since there was no trial, there could be neither a *judex* nor a *formula*; and therefore the *legis actio* procedure survived here also, long after the formulary system had become the sole means of trying ordinary actions.

(*b*) *The development of the formula.*

It has been stated already that there was nothing revolutionary in the praetorian reforms, and it is not to be supposed that, capable as the formula was of securing a trial for a violation of any sort of right, the praetor granted such remedy without discrimination. At first, probably, the formula existed (so far as the *praetor urbanus* was concerned) as a novel means of enforcing a right already recognised by the civil law; as time went on and the reasonable nature of the institutions of the *jus gentium*, as administered by the *praetor peregrinus*, came to be appreciated at their true value, new remedies, based upon this law, might be announced by the *praetor urbanus* in his

[1] This suggestion is hardly supported by evidence.

edict upon which the *formulae* depended. But so tentatively was the work of reform undertaken that the *praetor*, when a new set of facts came up for decision, would only grant a formula on the fictitious assumption that certain facts, which were not present, really existed, and that, therefore, a right already recognised by *jus civile* had been infringed. Thus a *bonorum possessor* and the purchaser of a dead bankrupt's estate (*bonorum emptor*) sued on the fiction (*ficto se herede*) that the former was the heir at *jus civile* of the deceased, the latter of the bankrupt. The *actio Publiciana* was of the same nature, the fiction being that the plaintiff had held for the period of usucapion. So too the false assumption might be that a *peregrinus* was a Roman citizen (*e.g.* to enable him to sue or be sued by the *actio furti* [1]), or that a *capite minutus* (*e.g.* a person adrogated) was in fact *sui juris*, so that his creditors might sue. Later the *praetor*, feeling more certain of his ground, proceeded directly,[2] by virtue of his *imperium*, to grant an action (*in factum concepta*), where there was no civil remedy, without resorting to any fiction. Another means, besides fictions, by which procedure was developed, was the *actio per sponsionem*, which began within the *legis actio* system owing to the introduction of *legis actio per condictionem* by the *lex Silia*. The *actio per sponsionem* depended on a bet, which the parties entered into in order to enable the ownership of the thing to be determined incidentally. On the bet a *condictio* could be drafted, and, as in the *sacramentum*, the decision incidentally determined the disputed question of ownership. Since the bet was merely intended to enable this, the real question, to be tried, it was not

[1] G. iv. 37. [2] *I.e.* without resorting to a fiction in any sense.

within the contemplation of the parties that it should be really paid; the *sponsio*, therefore, was called *praejudicialis*, as distinguished from the wager in the *condictio* which was paid, and therefore called *poenalis*. In the developed law, however, a *formula petitoria* was devised, whereby the dispute as to ownership could be directly submitted to the judge. 'If it appears that A is owner, then, unless B restores the object in dispute, condemn him in a money payment.' This *formula* is the most common example of the *actio arbitraria*. There was an *arbitrium* or alternative because, if the plaintiff succeeded, the defendant might elect, under the terms of the *condemnatio*, either to return the thing or to be condemned to pay the sum at which the plaintiff on oath (*jusjurandum in litem*) estimated its value.

But the development of the formula is important not merely in itself, but for the change worked through the formula in the legal system itself. Like the writ system, which was the making of the English common law, the formulary system was the foundation of Roman law, and in both cases the substantive law was built up through the instrumentality of procedure. The praetor's control over the formula was absolute; he could refuse an action where one lay at civil law, and in this way he in fact got rid of what was obsolete in the old *jus civile*; or he could grant the action, but defeat it by putting in some defence, like that of fraud, which the quickened conscience of the people felt to be desirable; and, by granting actions where none lay at civil law, he could meet the needs of social development. All this too was only achieved after careful trial and experiment; the development of the law was kept in constant touch with experience,

by men of the highest ability, who had no thought but to fashion the law into as perfect an instrument of justice as they could devise.

(*c*) *Procedure under the formulary system.*

In order to obtain the formula the plaintiff had to summon the defendant before the praetor (*in jus vocatio*). If the defendant failed to obey the summons, or to come to terms with the plaintiff, or to furnish a *vindex* to answer for him, the praetor provided a penalty in his edict (G. iv. 46), or the plaintiff could bring him by force before the magistrate, and if the defendant lay concealed to avoid summons, the praetor gave the plaintiff possession of his estate, with a right of sale as a last resort.

If the hearing *in jure* could not be finished on the day of appearance, the defendant had to enter into recognisances (*vadimonium*), *i.e.* to promise, in answer to a stipulation, to appear on the day appointed. When the defendant was only required to do this, the *vadimonium* was *purum*; but in certain cases he had to be supported by sureties. The plaintiff, having got the defendant before the Court, proceeded to state his claim, and asked for a formula from among those usually set forth in the edict that seemed to fit his case. If the praetor were satisfied, the formula would be granted. First came the appointment of the *judex* (*nominatio judicis*) from the *album judicum* as before, followed by the terms of the formula, composed with great care, for the instruction of the judge. The proceedings had now reached the very important stage of *litis contestatio* or joinder of issue, probably so called because under the *legis actio* system, after the formulation of the claims of the parties in appropriate *certa verba*, the litigants seemed to have made an

appeal to their witnesses in Court to bear witness to the verity of their claims, a feature which might perhaps be present here too. In certain cases there might be an *arbiter* instead of a judge, perhaps where the matter was one that required special knowledge, and in others there might be *recuperatores* even for *cives*. The next stage took place, after an interval, before the *judex*, who was directed, usually, to condemn or absolve the defendant, according to his findings under the directions in the formula. Condemnation was in money; there was no appeal, but in certain cases there might be relief by the praetorian *restitutio in integrum*. Execution was not now in the form of the old *manus injectio*. If after thirty days the judgment was not satisfied the *actio judicati*[1] lay to recover double damages, to secure the recovery of which a surety was required to give the necessary *satisdatio* (personal security) in case of an attempt to prove that the judgment was in some respect defective. The creditor could still, under the sanction of the praetor, march his debtor home as before, and make him work off the debt, but the infliction of cruel punishments, or of death, or sale into slavery had all disappeared.[2] Shorn of its advantages, the method of personal seizure could not have been attractive, and so the praetor introduced, as an alternative, execution on the debtor's property called *bonorum venditio*, which will be explained later.

(*d*) *The formula.*

The chief parts of the formula will be considered shortly:

[1] An action on a judgment *in duplum* against a defendant who denied liability and leading up to execution, *i.e. venditio bonorum* (*infra*, p. 445), could be founded on it.

[2] *Lex Poetelia*, p. 445.

(i.) *Nominatio judicis*, 'Let Titius be judge' (*Titius judex esto*), invariably found; the judge had no option but to act.

(ii.) *Praescriptio*, where needed, came next. Its purpose might be—(*a*) *pro actore* to protect the plaintiff by narrowing down his claim; *e.g.* where money lent was payable in a series of instalments of which some only were due. This was effected by inserting, *Ea res agatur cujus rei dies fuit*, thus limiting the claim to what was due at the moment only. (*b*) *pro reo*, in the interests of the defendant. Thus A, as the heir of Balbus, claims a slave from B, and B claims likewise that he is the heir of Balbus, not A. It is not desirable that the question of the inheritance should be thus incidentally decided. B accordingly has a *praescriptio* inserted to the effect that the action is not to be decided if to do so would prejudice the question of the right to the inheritance, as in this case it does. This forces A to bring his *hereditatis petitio* first to decide the question of heirship. In later law the *praescriptio pro reo* was replaced by the *exceptio*.

(iii.) *Demonstratio*. Gaius says it was the part of the formula which set forth at the outset, not the claim, but the facts out of which the claim arose. It was not an essential part of every formula, but seems to have been used in certain actions *in personam*, but it is not clear which. Gaius's example is, 'Whereas *Aulus Agerius* (the plaintiff is always so designated in examples of *formulae* from the verb *agere*, to sue) sold (or deposited) a slave with *Numerius Negidus* (the designation of the defendant, from *negare*, to deny)'. A mistake in the *demonstratio* was not vital; either an adjustment was possible, or the action could be brought again with the facts correctly described.

(iv.) The *intentio* was the clause of the formula which contained the plaintiff's *statement of claim*, and in the *intentio* the plaintiff either alleged a civil law right (when the *intentio* was *in jus concepta*) or a state of facts which the praetor considered ought, in equity, to constitute a right (*in factum concepta*). The word *paret* is usually the mark of this clause which, in addition to the nomination of the *judex*, was the one thing absolutely necessary in every action; for, obviously, there can be no suit without a statement of claim. Sometimes the formula might consist solely of the judge's nomination and the *intentio*; *e.g.* where some preliminary issue had to be determined, such as whether a given person was a freedman or not; a question of fact which, since it involved no liability on the part of any third person, did not require a *condemnatio*. It was the *intentio* that gave the clue to the nature of the action, whether it was *in rem* or *in personam*; *stricti juris* or *bonae fidei*; *in jus concepta* or *in factum concepta*; for a *certum* or an *incertum*.

(v.) *Exceptio*. This was a special defence raised immediately after the *intentio*. If the defence was a denial of the plaintiff's claim, no *exceptio* was needed. But if the plaintiff admitted the validity of the claim, but nevertheless alleged certain circumstances in his favour, which on grounds of equity or otherwise entitled him to be absolved, such special defences had to be raised by way of *exceptio*. Some *exceptiones* rested on enactments of one kind or another, *e.g.* the *exceptio S.C. Macedoniani*, where money had been lent to a *filiusfamilias*; others might be based on the praetorian edict, which was more usually the case, like the

[1] It was also unnecessary in a *condictio certi*.

exceptio doli; these were mainly equitable in character. In form it began with *nisi, si non*, etc. If, for instance, A is claiming 10 lent to B, the judge will be directed to condemn, if the loan is proved, unless it appears that B was a *filiusfamilias* (*exceptio S.C. Macedoniani*), or that the money had not in fact been handed over (*exceptio non numeratae pecuniae*). Equitable *exceptiones* need not be pleaded in *bonae-fidei* actions on account of the words *ex fide bona* which appeared in the formula and permitted the judge to take such matters into account in his *sententia*; but they had to be expressly pleaded in *stricti juris* actions, while those resting on enactment had always to be pleaded.

To the *exceptio* there might be a *replicatio* (reply) inserted for the plaintiff's benefit, which, if proved, destroyed the force of the *exceptio*. A, *e.g.*, claims 50 *aurei* from B, who pleads the *exceptio pacti de non petendo* (a pact not to sue). A, by *replicatio*, alleges that subsequently B agreed to pay (*replicatio pacti de petendo*). A *duplicatio* might reply to this.

Exceptions were either *peremptoriae* (or *perpetuae*) which would invariably defeat the action, *e.g.* the *exceptio doli*, and those based on statute; or *dilatoriae* (or *temporales*) which sufficed to defeat the action at the time only, *e.g.* if money due under a condition was claimed before the condition had been satisfied.

(vi.) *Condemnatio*, which appeared in nearly every case, but never alone, was the clause which empowered the judge to condemn or absolve according to whether the plaintiff proved his case or not. The *condemnatio* was *certa* where, the claim being for a liquidated amount (*e.g.* 50 *aurei*), the judge was told

to condemn in that amount ;[1] it was *incerta* where the damages were left to the judge ; and his right to assess damages in the latter case might be unfettered (*e.g. Quanti homo est, tantam pecuniam . . . condemna*), or such right might be limited by the formula (*taxatio*), *e.g.* ' condemn in what you consider the value, but not beyond (*dumtaxat*) ten thousand sesterces ' ; in which case the *condemnatio* was *incerta cum taxatione.* The condemnation clause (whether *certa* or *incerta*) was always framed so as to authorise the ultimate judgment being given for a sum of money. Hence specific performance or restitution could not be decreed in an action for the recovery of corporeal property : *judex non ipsam rem condemnat eum cum quo actum est, sicut olim fieri solebat, sed aestimata re pecuniam eum condemnat* (G. iv. 48). But specific restitution was practically obtained by means of the *clausula arbitraria,* which directed the *judex* to order specific restitution, and to condemn only if this was not obeyed. The plaintiff was thereupon required to assess the value of the thing on oath (*jusjurandum in litem*) and the defendant was condemned to pay the sum as assessed. Gaius seems to imply (*sicut olim*) that under the *legis actio* system specific restitution could be ordered.

(vii.) The *adjudicatio* only occurred in place of the *condemnatio* in the case of *judicia divisoria* (partition suits), and was the clause which enabled the judge to divide the property among the various parties to the suit (*e.g.* co-heirs). The form given by Gaius is *Quantum adjudicari oportet, judex Titio adjudicato.* Since it rarely happens that property can be divided with absolute equality, the *adjudicatio* might be

[1] If he gave more, *litem suam fecit.*

combined with a *condemnatio* empowering the judge to order those persons who obtained more than their fair share to pay monetary compensation to the others.

(*d*) *Litis contestatio, the trial, appeals.*

When the formula was complete and delivered to the parties by the magistrate, *litis contestatio* took place, and the proceedings *in jure* came to an end. *Litis contestatio* had the following effects :

(i.) If the proceedings took the form of a *judicium legitimum in personam* alleging a civil law right,[1] *litis contestatio* operated as *novatio necessaria* ; the plaintiff's right of action was at an end and replaced by his right, if the trial ended in his favour, that the defendant should be condemned. This effect, however, was not produced by a *judicium imperio continens*, or by a *judicium legitimum* if *in rem*, or if the issue were purely one of fact.[2] In these cases the plaintiff might bring a fresh action, but if the former action had really covered the same point, the defendant could defeat it by means of *exceptio rei judicatae, vel in judicium deductae* ;[3] so that the maxim *de eadem re bis experiri non licet* was absolutely true in the first class of cases, relatively in the second. Whether the *exceptio* referred to in Gaius is one, or really two separate ones, is not clear.

(ii.) In a *judicium stricti juris* the value of the property in question was ascertained at this stage, instead of at the date of the judgment, which was the case where the *judicium* was *bonae fidei*.

(iii.) In all cases the thing in dispute became *res litigiosa*, and could not be alienated.

[1] *Formula in jus concepta.* [2] *In factum concepta.*
[3] G. iii. 181.

(iv.) Thenceforth the action was good against heirs, even though originally it could not have been brought against them (*e.g. actio injuriarum*).

(v.) In cases of delict, where the heir was suable so far as enriched, the question was determined at this moment.[1]

(vi.) The action became a *lis pendens*, and so stopped prescription; *i.e.* the plaintiff could no longer be barred, because he failed to bring his action in due time; *e.g.* if an action had to be brought within a year, and was so brought, it could continue to judgment though the year had expired.

(vii.) From this moment the defendant, if he subsequently failed, was bound in *stricta judicia* to account to the plaintiff for all profits or fruits arising from the object in dispute, and became liable, whether originally so bound or not, for *exacta diligentia* in the custody of such object.

(viii.) The Proculians held that in an action *stricti juris* the liability of the defendant was determined at the moment of *litis contestatio*, and that if he proved, at the trial, to have been in the wrong then, no subsequent event, *e.g.* the accidental destruction of the object, or even payment of everything due, could save him from condemnation. The Sabinians adopted the opposite and more lenient view, on the maxim *omnia judicia esse absolutoria*, and their opinion was subsequently confirmed.[2]

(ix.) *Usucapio* was not interrupted, but prescription was; this was of no importance, as the decision would go as the facts stood at *litis contestatio*.

In certain cases the proceedings might never get beyond the hearing *in jure*. This would be the case—

[1] Poste, p. 400.

[2] J. iv. 12. 2.

(i.) Where the object was to obtain security rather than redress; *e.g.* the defendant was required to enter into a stipulation to indemnify the plaintiff in respect of apprehended damage.

(ii.) Where, in lieu of evidence, the matter was decided by the oath of the parties. This could always be done formally by agreement of the parties, in which case one had to tender an oath (*jusjurandum*) to the other, and, if accepted, the matter was concluded. If, *e.g.*, the plaintiff tendered an oath to the defendant requiring him to swear that he was not liable, and the defendant accepted the challenge, such oath was final and, the case ending, no trial was required. In certain cases (*e.g. actio furti*) the plaintiff had the right to require the defendant to make oath, when the defendant might retort by demanding that the plaintiff should swear to his own *bona fides* (*de calumnia jurare*); or the defendant might, instead of taking the oath himself, require the plaintiff to swear to the justice of his claim, and if the plaintiff refused the praetor would not grant a trial.[1]

(iii.) A trial was unnecessary where the defendant admitted his liability before the praetor (*confessio in jure*).

(iv.) Sometimes a plaintiff, before asking for a formula, might ask a possible defendant for information (*interrogatio in jure*), *e.g.* whether the defendant was the heir of Balbus, against whose estate the plaintiff had a claim. If the answer was in the negative, there would be no point in proceeding with the action.

The subsequent trial (*judicium*)[2] took place on a day fixed by the praetor or the judge himself. The

[1] See Roby, ii. 394-397. [2] *Ib.* 407-419.

trial was public, the parties appeared personally or by agents,[1] and, in important cases, might have their cause pleaded by orators who, at first, acted gratuitously. Evidence was taken on oath, and, in lieu of evidence, the parties might agree that one should tender the other an oath, as before the praetor, or the judge might himself suggest this method. Finally, judgment was pronounced, which might be interlocutory or final. An example of an interlocutory judgment would be where A sues B in respect of a contract made by B's slave C. The judge first ascertains whether B has benefited by the contract. If the benefit amounts to the whole sum due the judgment is final. Otherwise it is interlocutory, for the judge proceeds to inquire whether the slave has a *peculium*, and gives a final judgment on that footing.

The judgment was technically called *sententia*, *i.e.* the opinion of the private individual on the facts, as distinguished from a *decretum* on the part of a magistrate; and once the *sententia* had been given the *judex* was *functus officio*, *i.e.* he had no power to vary or discharge his decision.[2]

Appeals.—Under the formulary system there was no right of appeal from the *sententia* of a judge, though in exceptional cases the judgment might be, in effect, annulled by the praetor granting *in integrum restitutio*. The system of appeals may have been applied to proceedings by *formula* towards the end of that régime, but there is no evidence of this.

[1] See Roby, ii. 422.

[2] For modes of executing a judgment *vide infra*, p. 444.

Subsect. 3. The System of Cognitio extraordinaria[1]

Though the fact was unperceived by Gaius, the way had been prepared for the downfall of the formulary system when Hadrian finally deprived the praetorian edict of its former effect. For the whole procedure by way of formula depended upon the authority of the praetor, and when it was no longer possible for Roman law to keep pace with the needs of the times by means of the edict, the formula, which had no real existence apart from it, could hardly escape from becoming as technical and stereotyped as the *legis actiones* which it had replaced. It is not surprising, therefore, to find that by another gradual development, the formulary system was overturned in favour of a procedure under which the time-honoured distinction between proceedings *in jure* and *in judicio* entirely disappeared, the trial being conducted throughout before a State official.

Even under the older system the public mind had become familiar with the idea that the magistrate might, as in modern times, dispose of the whole matter; for this was, in fact, the case not only in the instances above mentioned, where for some reason the cause came to an end before the praetor, but whenever the praetor acted *extra ordinem*, *i.e.* outside the regular procedure, as he might. This would usually be with respect to administrative, not judicial matters, *e.g.* by interdict,[2] where the public interest was involved, *e.g.* questions concerning temples, roads, burial-grounds, *restitutio in integrum*, *missio in possessionem*, and the like. But under the Empire this was extended to judicial and quasi-judicial functions, *e.g.*

[1] *I.e. extra ordinem judiciorum privatorum.*

[2] P. 434.

the *praetor fideicommissarius*, who enforced *fideicommissa*; the *praetor tutelaris*, who appointed and removed tutors; and there were other cases.

Further, from the establishment of the Empire, whenever the Emperor himself decided a case, the procedure was *extra ordinem*. The first general change was in the provinces—probably in the Imperial provinces at first, followed by the others—the change being complete probably before the end of the classical age. The Constitution of Diocletian, A.D. 294, did not inaugurate the change in the provinces, but simply directed provincial governors to hear the case themselves, except in unimportant cases where there might be a delegation to a *judex pedaneus* (not to be confused with the *unus judex*), who seems to have been an official judge of some sort. This was merely a direction to greater diligence on the part of the *praeses*, not the origin of a new institution. It is probable that the *ordo* with its formula had been superseded even in Rome some time earlier, for Diocletian had reorganised the whole Empire, making a *provincia* the unit of administration, Italy itself being divided into seventeen provinces; and the term provincial governors must be understood as affected by this change.[1]

The system of *extraordinaria cognitio* as developed under Justinian was as follows: In the first place, it was no longer requisite or proper for the plaintiff personally to secure the attendance of the other party before the magistrate. The magistrate himself summoned the defendant to appear on the plaintiff's written petition (*libellus conventionis*), and this request was served by the magistrate's agent, who might

[1] *Juris formulae, aucupatione syllabarum insidiantes, cunctorum actibus radicitus amputentur* (Cod. ii. 58. 1).

arrest the defendant if he refused to undertake to appear (*cautio judicio sisti*). The *libellus conventionis* was very like the *intentio* of the formulary system, and the modern statement of claim, since it set forth in a succinct manner the nature of the plaintiff's right and the circumstances attending its alleged violation. It had to be signed by the plaintiff or his agent, and, in addition, the plaintiff undertook, by a *cautio* (which, like the *libellus conventionis*, was registered in the *acta*), to pursue his action and to pay the costs of the defendant if unsuccessful. The statement of defence which the defendant was called upon to put in, in answer, was called the *libellus contradictionis*. The whole trial took place before the same magistrate, before whom the parties appeared on the appointed day and pleaded their cases. A *confessio in jure* might take place, in which case judgment followed at once. An *interrogatio* might be put in at any stage, and the plaintiff might require an oath from the defendant, even against his will, not only in exceptional but in all cases, carrying with it the right of *relatio* as before. *Litis contestatio* still took place, viz. at the moment when the issue had been definitely arrived at, each party having sufficiently put forward the matters on which he relied; but, although some of its ancient effects remained,[1] *litis contestatio* no longer operated as *novatio necessaria*, and the *exceptio rei in judicium deductae* seems to disappear.

Finally, after hearing the evidence and arguments, the magistrate settled the whole matter, no longer by a *sententia*, but by a *decretum*, by which any sort of order which the circumstances demanded could be

[1] *E.g.* it still prevented the plaintiff's action being barred by lapse of time.

made, since the magistrate was no longer bound by a formula directing condemnation in a sum of money ; so, *e.g.*, where the object of the action was the recovery of property, the magistrate might decree specific performance, *i.e.* actual restitution, in lieu of the old practice by way of *formula petitoria* ; in other words, the defendant no longer had the option, in such case, of either paying damages or restoring the object. There might be an appeal through a hierarchy of Courts to the Emperor himself. After final judgment there followed a period for its satisfaction, failing which execution followed. There was now no *actio judicati* or *venditio bonorum*. If the judgment were for some specific thing, officials were sent to seize it and make it over to the plaintiff. In the case of a sum of money, sufficient property belonging to the debtor was seized and later sold in satisfaction of it. In the case of insolvency the procedure was by *distractio bonorum* (*infra*).

Section II. The Division of Actions

Actions may be classified as follows :

1. *In rem—in personam—mixed.*

An action *in rem* is one brought in respect of some *res corporalis* which the plaintiff claims against all the world, and of which the *vindicatio rei* is the type. The defendant is not mentioned in the *intentio*, but in the *condemnatio*. Such actions included claims to servitudes (*actio confessoria*), or to freedom from servitudes (*actio negatoria*). An action *in personam* is brought to enforce an obligation due only from the defendant. The defendant was named in the *intentio*,

and it was claimed in *stricti juris* actions that he ought (*oportere*) to give or do something for the plaintiff.[1]

A mixed action was regarded by Justinian as both real and personal, as it might result in the award of property and condemnation in a money sum; the examples given are the *actio familiae erciscundae* (among co-heirs), the *actio de communi dividundo* (between partners), and the *actio finium regundorum* (between owners of adjoining estates).[2]

Prejudicial actions (*praejudiciales*), to determine a preliminary issue, *e.g.* whether a man was born free, seem, says Justinian, to be *in rem*, a remark which is important as denoting a change in the conception of the term *in rem*, and supplying to some extent the bridge between the application of the term to actions and the modern classification of rights *in rem*.[3]

2. *Actiones civiles—actiones honorariae.*

Of the former the *vindicatio* and the *condictio* are examples, being founded on the civil law. The latter were those which arose by virtue of the praetor's jurisdiction.

An example of a praetorian real action is the *actio Publiciana*, which protected a person in possession (which was about to become *dominium* by usucapion) by allowing the fiction that the period of usucapion was complete; the bonitary owner was completely protected by it, but the *bona-fide* possessor had no answer to the true owner, who could defeat him by the *exceptio justi dominii*.

Examples of praetorian personal actions (*in factum*) are—(i.) *actio de pecunia constituta*, to enforce a *con-*

[1] A delict is a violation of a right *in rem*, but the obligation it gives rise to is a personal one.

[2] J. iv. 6. 20.

[3] J. iv. 6. 13.

stitutum; (ii.) *actio receptitia*, which was an action against a banker based on his undertaking (*receptum*) to pay someone else's debt; (iii.) *de peculio*;[1] (iv.) the action to determine whether an oath had been taken, *an juraverit*. This lay where the procedure was by oath. If, *e.g.*, the plaintiff swore that the money in dispute was due to him, and the defendant refused to pay, the praetor granted a new action, in which the question was no longer on the old issue, but whether or not the oath had been taken. (v.) *Actio de albo corrupto*, a penal action against anyone who tampered with the praetor's *album judicum*; and (vi.) actions against freedmen or children who proceeded against their patron or ascendant without the praetor's permission. In these the judge was to condemn if he found certain facts proved.

3. *Actio in jus concepta—actio in factum concepta.*[2]

An action *in jus concepta* was where the *intentio* alleged a civil law right either alone, or as extended by the praetor by means of a modified *intentio* (*actio utilis*). An *actio* was *in factum concepta* when the *intentio* set out certain facts, which were clothed with a right by the edict only.

4. *Actio utilis — directa — in factum praescriptis verbis.*

Actio utilis.—The praetor, instead of introducing a new right by an *actio in factum*, might retain the formula applicable to a civil law right, or to an existing praetorian right, and modify it to suit the new facts. An action of this kind was called an *utilis actio*, *i.e.* an *actio* utilised to meet new cases; the modification

[1] P. 341.

[2] This and the following division were closely connected with the formulary system, and of little interest in Justinian's time.

might, but need not, be by means of a fiction (hence the *actio fictitia*, a form of *utilis actio*).

An *actio directa*, on the other hand, was where the *intentio* was unmodified, following exactly the words of the civil law or the edict.

An *actio utilis* might obviously be founded not merely on an existing *actio in jus*, but on an *actio in factum concepta*. The praetor, *e.g.* grants in his edict an action (*directa*), because certain facts exist (*in factum concepta*), *e.g. actio Serviana* (to a farmer). Subsequently, finding it necessary to protect other mortgagees besides farmers, he modifies the *intentio* and so creates a new (*utilis*) action (*quasi-Serviana*). Actions both *in factum* and *utiles* were praetorian. An *actio in jus concepta* might be either civil or praetorian, the former where the *intentio* was shaped on a civil law right, the latter where the *intentio* depended upon such right as modified by the praetor (*actio utilis in jus concepta*). Similarly, with an *actio directa*, it was civil where the *intentio* depended on statute or custom, praetorian when given in so many words by the edict.[1]

An *actio praescriptis verbis* or *civilis in factum* (the remedy on the innominate contracts) must be distinguished from an ordinary *actio in factum*; for the former was an *actio in factum civilis*, with an *intentio in jus concepta*, the *facts* being set out there in place of a *demonstratio*.

5. *Stricti juris—bonae fidei.*

An action *stricti juris* was one brought on a *negotium stricti juris*, *e.g.* a *condictio* brought on a stipulation, as opposed to an action founded on a *bonae-fidei negotium*, *e.g.* contracts where the parties were bound

[1] See Sohm, pp. 271-276.

not necessarily to the exact performance of their engagements, but (as in all the consensual contracts) where it was the duty of the *judex* to determine what was fair and reasonable between them, and to give effect to what was fair and right between the parties, though not expressly authorised by the formula so to do. Hence the *intentio* in a *bonae-fidei actio* never imposed a fixed limit upon the claim by naming a definite sum (*certa*), but was always general in its terms, *i.e. incerta* (*quidquid Balbum Seio dare facere oportet ex bona fide*).

The chief differences between these two classes of actions need to be noticed.

(i.) The former arose on unilateral transactions, contractual and *quasi-contractual*, while the latter were formulated in connection with bilateral obligations of the same sort, both being *in jus*.

(ii.) In the former the formula had to be strictly construed : the judge could take account of nothing not contained in it. Hence defences must be expressly pleaded by an *exceptio*, and if the defendant was liable upon the facts as they existed at *litis contestatio* the judge had no option but to condemn. In *bonae-fidei judicia* the judge was permitted by the words *ex fide bona* to take into account any equitable defences, which accordingly need not be specially pleaded ; and if after *litis contestatio* the defendant had satisfied the claim the judge could absolve. The Sabinians urged against the Proculians that the more liberal rule should apply to all *judicia*, a view that prevailed (*omnia judicia absolutoria*).

(iii.) *Pacta adjecta* (added) to a transaction were common in *bonae-fidei judicia*, and might be added to such *stricta judicia* as *mutuum*, and later to stipulations.

(iv.) In *stricta judicia* interest and fruits were due from *litis contestatio*, but in *bonae-fidei judicia* from *mora* (*i.e.* the time of the defendant's default).

(v.) There could be no set-off (*compensatio*) in *stricta judicia* at first, but any counterclaim could be given effect to in *bonae-fidei judicia*.

6. *Judicia legitima and imperio continentia.*

The former, says Gaius, were between *cives*, before a single *judex*, the proceedings being held within one mile of Rome; all others belonging to the latter class. The distinction was perhaps due to the *lex Aebutia*, and was material in various ways, for a woman needed the *auctoritas* of her tutor to be a party to a *judicium legitimum*, and death at once ended the proceedings, which under the *lex Julia judicaria* were also extinguished in eighteen months. The latter rested on the praetor's *imperium* and ended with it. The distinction, which enjoyed significance only under the formulary system, died with it. Theodosius fixed thirty years from *litis contestatio*, and Justinian substituted three years from the commencement of the proceedings, as the limit within which the proceeding in the action must be completed.

7. *Perpetuae—temporales.* The terms are used in two senses, viz.: as denoting (i.) how long *a right* of action lasts; (ii.) how long the action itself is allowed to continue.

(i.) Originally all actions founded upon the civil law were *perpetuae*, for no lapse of time was sufficient to bar them; praetorian actions, on the other hand, were usually *temporales*, and were lost if not brought within a year; exceptionally, however, a praetorian action, if modelled on the civil law, might be *perpetua*,

e.g. that given to a *bonorum possessor* and the *actio furti manifesti*. Conversely, even a civil law claim to specific property in the hands of another might be lost by the operation of usucapion; and the *querela inofficiosi testamenti* was expressly limited to five years. But the old distinction between *actiones perpetuae* (*i.e.* most civil law actions, those granted to praetorian successors, and the *actio furti*) and *actiones temporales* (*i.e.* most praetorian actions, the *querela*, and claims to specific property) continued down to the time of Constantine, who provided that forty (subsequently reduced to thirty) years' delay should give rise to an *exceptio* in all real actions, and Theodosius extended, this thirty years' limit to practically all *perpetuae actiones*. Under Justinian the same principle obtained, though very exceptionally an *actio* might still be *perpetua, e.g.* a *vindicatio in libertatem*.

(ii.) The action itself [1] was always *temporalis*, and, in the time of Gaius, expired (if the action were not pursued to an end previously) in eighteen months if the *judicium* were *legitimum*, while if *imperio continens* it ended with the term of office of the magistrate who granted it. Under Justinian the action might 'sleep', with the consent of both parties, for forty years, otherwise it came to an end in three.

8. *Actions for the recovery of a thing—for a penalty —mixed.*

An action *rei persequendae causa* was a term which covered every action, whether real or personal, of which the object was redress merely, as distinguished from an action for redress and a penalty (mixed), or for a penalty merely. A *vindicatio*, actions on *commodatum*, *mandatum*, *societas*, sale and hire, were all

[1] Unless *extra ordinem*, or before the *centumviri*.

rei persequendae causa. So, too, an action on a *depositum*, unless the case was one of *depositum miserabile*, when the action might be 'mixed', as it would lie for double damages against a depositary, or his heir, if personally guilty of fraud.[1] Another instance of a mixed action in this sense [2] was the *actio vi bonorum raptorum*; an action under the *lex Aquilia* might be *rei persecutoria* merely (*e.g.* if the defendant admitted liability, and the object had not been of greater value during the preceding period), or mixed, according to circumstances. The *actio furti* was purely penal (*poenae persequendae causa*), as in addition to the damages recoverable the owner could get the thing itself by a separate action.[3]

9. *Actions in simplum, in duplum, in triplum vel in quadruplum.*[4]

An action was *in simplum* where the value of the object in dispute only was sued for, *e.g.* in the contract of sale; *in duplum* for twice the value (*e.g. actio furti nec manifesti, actio servi corrupti*); *in triplum* for thrice the value, *e.g.* where the plaintiff claimed in his *libellus conventionis* a greater sum than that due, so that the officer who served it (*viator*) claimed an excessive fee;[5] *in quadruplum* for four times the value, *e.g.* the *actio furti manifesti* and the *actio quod metus causa.*

10. *Actions to recover the whole of what is due—for less.*

[1] J. iv. 6. 17.

[2] *I.e.* as distinguished from one regarded as partly real and partly personal, *supra.*

[3] J. iv. 6. 18.

[4] It will be observed that many of these divisions are 'cross divisions'.

[5] The *viator* was entitled to a fee (*sportulae*) in proportion to the value of the demand.

An action was, of course, normally for the whole loss sustained, but, under exceptional circumstances, the plaintiff was allowed to recover part only, *e.g.*— (i.) in the *actio de peculio* the father or master was only liable to pay the whole debt of a son or slave where the *peculium*, after answering his own claims, was sufficient; (ii.) where an action lay against a husband for the *dos*, or against a person who had promised a gift, or was brought by a person against his ascendant, patron, or partner; the defendant, in each case, could not be condemned beyond his means, *i.e.* the condemnation was not allowed to be of such an amount as to reduce him to actual destitution;[1] (iii.) less might also be recovered by reason of a set-off (*compensatio*).[2]

11. Actions might also be regarded as based upon an obligation created by contract, quasi-contract, delict, or quasi-delict; but this division is not expressly made in the *Institutes*.

12. Lastly, an action might be either in respect of the defendant's own obligations (*directa*), or in respect of those created by means of his agent (*actiones adjectitiae qualitatis*).[3]

Section III. Compensatio and Deductio. Plus Petitio

(*a*) *Compensatio and deductio.*

In England, if the defendant has no answer to the plaintiff's claim but that he himself is owed by the plaintiff a greater, equal, or less sum, such plea can,

[1] The privilege of the defendant in such cases is called *beneficium competentiae*. [2] *Infra*. [3] P. 341.

as a rule, be raised by counterclaim: the defendant admits the case of the plaintiff, and then, in the same action, sets up his own case, and, if he proves it, judgment follows for the difference between the two claims; for the defendant, if the sum due to him on the whole transaction exceeds that due to the plaintiff; otherwise for the plaintiff, though not necessarily for the whole sum originally demanded.

Much the same result was gradually arrived at among the Romans by the doctrine of *compensatio*, which was defined as *debiti et crediti inter se contributio*. According to the civil law, if an obligation were created by some *negotium stricti juris* (*e.g.* a stipulation), and action were brought upon it, the plaintiff must succeed, although the defendant owed him an equal or greater amount on some other transaction. If, *e.g.*, A promised B 500 *aurei* by stipulation, the unilateral obligation so imposed on A could not be met with a plea that B owed A 500 *aurei* for the purchase-money of a horse (*emptio-venditio*). The two transactions were wholly unlike, and each party must enforce his claim independently. A *negotium bonae fidei*, on the other hand, implied mutual obligations, *i.e. obligationes ex eadem causa* (from the same transaction), and the judge was allowed, therefore, in such cases (*i.e. in judicia bonae fidei*), to 'set off' the mutual claims of the parties, if, in his discretion, he thought right, though there was nothing in the formula expressly authorising him so to do except the words *ex fide bona*. In the case of a banker (*argentarius*) and of the purchaser of a bankrupt's estate (*bonorum emptor*) a different course prevailed: the formula itself was modified. If an *argentarius* sued a customer, the modification was in the *intentio*, and he

was said, therefore, to be compelled to allow for compensation (*cogitur cum compensatione agere*), the *intentio* being framed as a demand for the balance only. The *bonorum emptor*, on the other hand, when suing some person who, though indebted to the bankrupt (whom the plaintiff represented), had a claim against him, sued *cum deductione* ; the *intentio* was for the full amount demanded, but the judge was instructed in the *condemnatio* to give judgment *cum deductione*, *i.e.* for the balance actually due.[1]

Marcus Aurelius seems to have provided that in *stricta judicia* a plaintiff could be met by the *exceptio doli* unless he allowed for the set-off, which, of course, must have arisen under a different transaction, but perhaps of the same kind. Failing to allow for the counterclaim probably meant the loss of the action by reason of the *exceptio*, though upon another view the *exceptio* operated only by way of reducing the *condemnatio*, so that the balance could be recovered.[2]

Justinian abolished the difference between the procedure in *bonae-fidei* actions (where compensation was in the discretion of the judge) and in those *stricti juris* (where the *exceptio doli* had to be expressly inserted *in jure*), and allowed compensation in all cases,[3] without any express plea, whatever the nature of the *judicium*, or of the action, save that—(α) the counterclaim must be easy of proof, and (β) it could not be made at all in an action on a *depositum*,[4] or to recover land wrongfully occupied.

[1] G. iv. 63-65. For minor differences between the *argentarius* and *bonorum emptor*, see G. iv. 66-68.

[2] See Sohm, pp. 459-460.

[3] Even *ex dispari causa* and in real actions. It is disputed whether Justinian was the first to bring these actions within the scope of the doctrine of ' set-off '.

[4] J. iv. 6. 30.

Justinian says that where the claims were easy of proof (*compensationes quae aperto jure nituntur*) the claims were automatically (*ipso jure*) reduced. But these words are not to be taken as meaning that the two claims extinguished one another (wholly or *pro tanto*) at the moment the 'set-off' arose; but that the counterclaim could be taken into consideration by the judge, though not expressly admitted in the plaintiff's *libellus conventionis*, and that such omission was not to be penalised in any way beyond the reduction of the claim by the amount of the set-off.[1]

(*b*) *Plus petitio.*

A plaintiff might in an action for a *certum* claim too much—

(i.) *Re*, as 500 *aurei* instead of five.

(ii.) *Tempore*, as where he sued in March for a debt due in June.

(iii.) *Loco*, as where the promise was to pay at Ephesus and the action was brought at Rome; or

(iv.) *Causa*, as where the promise was to give either fifty *aurei* or a slave, and the plaintiff sues only for one, so depriving the defendant of his option. Conversely, the plaintiff may claim too little.

The effect, in the time of Gaius, was as follows: A mistake in the *demonstratio* was harmless (*falsa demonstratione rem non perimi*);[2] a mistake amounting to *plus petitio*, if made in the *intentio*,[3] was fatal; if, on the other hand, the plaintiff claimed less than his due, the *intentio* was so far good, but the balance could not be claimed in the same praetorship; if

[1] Buckland, p. 700. [2] G. iv. 58.

[3] Where the *intentio* was *incerta* (*quidquid paret*) such a mistake was impossible.

it were so claimed, the defendant could raise the *exceptio litis dividuae* (that the plaintiff had no right to split up his demand). *Plus petitio* in the *condemnatio* did no harm, for the defendant could get *in integrum restitutio*, but if the plaintiff claimed less he lost the balance altogether. It was never fatal to claim, even in the *intentio*, one thing for another by mistake, *e.g.* 'Eros' instead of 'Stichus', for in the time of Gaius the plaintiff could bring a new action, and under Justinian the mistake could be corrected in the same proceeding.

Even under the formulary system, however, relief was given in respect of *plus petitio loco*, for a praetorian action could be brought, called *de eo quod certo loco dari oportet*, by which on non-payment at a particular place the creditor could sue elsewhere, and the judgment would take into consideration any loss the debtor sustained by reason of the change of locality. Zeno provided—(*α*) that where the *plus petitio* was *tempore* the plaintiff might sue again, on payment of the defendant's costs, and after waiting twice the time which would have been necessary otherwise; and (*β*) that where the plaintiff claimed less than his due (*e.g.* five *aurei* for ten) judgment might nevertheless be given for the whole. These modifications remained in Justinian's time, and that Emperor provided that if the overclaim were in any other way than *tempore* (*e.g. re*) the plaintiff was not to lose his case, but to be punished by being obliged to pay the defendant three times the amount of loss sustained by reason of the overclaim, *e.g.* in respect of excess paid by way of *sportulae* to the *viator*.

Section IV. Actiones Adjectitiae Qualitatis. Noxal Actions. Pauperies

(*a*) *Actiones adjectitiae qualitatis.*

Both Gaius and Justinian describe six actions by which a master or *paterfamilias* could be made liable on a contract entered into by someone in *potestas* (*e.g.* a slave or son); by two of them (*exercitoria* and *institoria*) a man might even become liable on a contract made by someone not in his *potestas*, *e.g.* some free third person. The actions, which were of praetorian origin, were called *adjectitiae qualitatis*, because, except in the case of a slave (who could never be sued), the actions offered an 'added' remedy; the contract in these cases being regarded as giving rise to two distinct obligations—one against the agent, the other against the principal. The actions in question were as follows: *quod jussu*, *exercitoria*, *institoria*, *tributoria*, *de in rem verso*, and *de peculio*, and have been sufficiently considered under the heading of 'agency'.[1]

(*b*) *Noxal actions* (which are also *adjectitiae qualitatis*).

Even by the time of the XII Tables the principle of *noxae deditio* had reached its second stage. A third person injured by another's son or slave had no longer the right to demand that the wrongdoer should be given up; his right was limited to an action claiming alternatively that the superior should either pay damages or surrender the offender.[2] In the time of Gaius noxal surrender existed in the case

[1] See p. 341.

[2] If a slave committed a wrong by his master's order, it was the master's own act, and he could be sued by direct action.

of slaves; in theory at any rate, in the case of sons; and in a modified form was applicable to persons *in mancipii causa* and a wife *in manu*.[1] The status of *in manu* and *in mancipii causa* had long been obsolete in Justinian's time, and the noxal surrender of sons had fallen wholly into disuse. A noxal action, therefore, only applied in the case of slaves, and a slave so surrendered, if he could find sufficient money to compensate for all the damage he had caused, could compel his new master to free him.[2]

Noxal actions were established either by statute or by the praetor. By statute in the case of theft (viz. by the XII Tables), and *damnum injuria datum* (*lex Aquilia*); by the *praetor* in the case of *injuria*, *vi bona rapta* and other praetorian wrongs. It had no application to contract or quasi-contract, and, of the quasi-delicts, it applied to things thrown from a house to the injury of passers-by on the highway.[3]

The action, which lay only where there was *potestas*, always followed the person of the wrong-doer. *Noxa caput sequitur.* If, therefore, A's slave X wronged B, B could sue A only so long as A owned X; if X were sold to C, in the absence of fraud, the action lay no longer against A, but against C. If X died before surrender, the surrender of his body sufficed, but not under Justinian, where death made the master liable *in solidum.* If X were manumitted, there was no possibility of a noxal action, but X could be sued personally by a direct action. Conversely, a direct action might become noxal, as where X, a free man *sui juris*, wronged B, and afterwards passed into C's *potestas* by adrogation or became C's slave. B's direct action against X became converted into a noxal

[1] Cf. G. iv. 80. [2] J. iv. 8. 3. [3] G. iv. 76.

action against C.[1] The usual procedure when the master did not propose to defend was to produce the man in Court, and the praetor would authorise the plaintiff to take him away. If the master neither surrendered nor defended, he became fully liable for the loss, and could not afterwards evade liability by surrender.

If several slaves were jointly concerned, logically all ought to be surrendered, but the praetor mitigated the hardship by fixing the damages as if only one slave were concerned.

A wrong done by A, a slave, to B, his own master, had no legal effect, because there could not be a civil obligation between a man and a person in his *potestas*. On the same principle, if A, who is B's slave, wronged C and was then bought by C, C's action became extinguished by merger (*confusio*).[2]

(*c*) *Pauperies.*—The XII Tables gave a species of noxal action against the owner of a four-footed animal which had caused damage without provocation. As in *noxae deditio* proper, it was the owner at the time of action brought who was liable, not necessarily the owner at the time of the wrong (*noxa caput sequitur*), and the defendant was obliged either to pay compensation or give up the animal. The action only lay where the animal acted *contra naturam, i.e.* viciously; and wholly wild animals were not within the principle, because, as soon as they escaped and so did damage, they ceased to have a master.[3]

The Aediles' edict provided a special remedy where a man kept a dog, wild boar, bear, or lion in

[1] But adrogation would not have this effect in Justinian's time, since it made X *filii loco*, and there was no surrender of sons.

[2] The Proculians thought it was merely suspended (G. iv. 78).

[3] J. iv. 9 *pr.*

a place where persons passed by (*qua vulgo iter fit*). If harm resulted and a freeman were hurt, the owner of the beast could be condemned as the judge thought fit; for other damage the penalty was double the damage done. The *actio de pauperie*, and that under the edict, could be brought concurrently, both being penal.

Section V. Praetorian Remedies: 1. Interdicts; 2. Restitutio in integrum; 3. Missio in possessionem; 4. Praetorian Stipulations

1. *Interdicts.*

Originally the term *interdictum* or *decretum* signified an order by the magistrate, issued by virtue of his *imperium*,[1] directing an individual to do (*decretum*) or abstain from doing (*interdictum*) some act; and the order was usually issued in the interest of the public, rather than for the convenience of private individuals. The object, for example, might be either to prevent or punish offences against property *extra commercium* (temples, burial-grounds, etc.), or to protect the *possession* of private property (*res in commercio*); for the disturbance of the possession of individual citizens easily leads to a breach of the public peace. At first such orders were probably made after the merits of the case had been fully considered, and were therefore final. The magistrate, as representing and in the interest of the State, arbitrarily settled the dispute once for all. In the time of Gaius, however, this was not the general rule, for an interdict, in most cases, was an order made without entering into the question of the strict rights

[1] *I.e.* a proceeding *extra ordinem.*

of the parties, and the merits of the case had to be tried subsequently in an ordinary *judicium* based on the *interdict*. Under the formulary system, therefore, an interdict was, usually, an extraordinary way of founding a trial before a *judex*; the *judicium* depending not on the customary proceedings *in jure*, but on an order issued, in a summary way, by the praetor in his administrative capacity.

Interdicts may be classified as follows:

(i.) An interdict might be *populare* (*i.e.* open to any one) as opposed to private (*i.e.* only available for some definite individual), though most interdicts were of the latter class. An example of the former is the *interdictum de homine libero exhibendo*, by which anyone (even a woman or *impubes*) might, as by the English writ of *Habeas Corpus*, compel the production of any person confined against his will.

(ii.) An interdict might be either *prohibitorium*, *restitutorium*, or *exhibitorium*. The first class (*prohibitoria*) forbade the doing of some act (*e.g.* disturbing possession, as in *uti possidetis* and *utrubi*)[1]; those termed *restitutoria* (as *unde vi*)[2] ordered a person to restore something wrongfully taken from another's possession; while *exhibitoria* aimed at the production of some object wrongly detained, *e.g.* the interdict *de homine libero exhibendo*, or that by which a *paterfamilias* compelled the production of a person under his *potestas*, wrongfully detained by another.

(iii.) An interdict might pass to the heirs or not: *unde vi* is an example of the former, *uti possidetis* of the latter class.[3]

[1] *Infra*, p. 438. [2] P. 437.

[3] Conversely, some passed against the heirs, *e.g. quod vi aut clam*; some not, *e.g. uti possidetis*.

(iv.) Some interdicts were concerned with the possession of property (possessory), *e.g. uti possidetis, utrubi, unde vi*; others not, *e.g.* for the production of an individual.

(v.) Those concerned with possession were either *adipiscendae, retinendae,* or *recuperandae causa.*

Examples of interdicts for acquiring possession were the *interdictum quorum bonorum* and the *interdictum Salvianum*; for retaining possession, *uti possidetis* and *utrubi*; for recovering possession, *unde vi.* [1]

(vi.) A possessory interdict might be 'single' or 'double'. Interdicts were single (*simplicia*) where in the subsequent proceedings the person who obtained the interdict was plaintiff and his adversary defendant (as in all the interdicts *restitutoria* and *exhibitoria*); double (*duplicia*), where each party was at once plaintiff and defendant (*e.g. uti possidetis* and *utrubi*).

(vii.) Lastly, an interdict might be either primary or secondary, *i.e.* where the first interdict proved insufficient to enable justice to be done between the parties, another, *e.g. interdictum secundarium,* might follow.

Procedure in interdicts.—The trial on the interdict, in the time of Gaius, took place sometimes by means of a *formula arbitraria,* sometimes *per sponsionem.* The former was the case when the interdict was either *exhibitorium* or *restitutorium,* and the defendant at the time when the order was granted chose to proceed in this way (*i.e.* asked for a trial, based on a *formula arbitraria,* before a *judex*). The proceedings were *per sponsionem* whenever the *interdictum* was *prohibitorium*; or the *interdictum* being of the other

[1] Sometimes an interdict might be *tam adipiscendae quam recuperandae* (Girard, 8th ed. pp. 1121-1124).

kinds, the defendant elected to have the matter tried otherwise than by the *formula arbitraria*; *e.g.* failed to ask for it when the interdict was granted.

(*a*) *By formula arbitraria.*—By way of illustration, suppose A asks the praetor for that species of *interdictum restitutorium* known as *unde vi*, against B, whom he alleges to have forcibly ousted him from possession of his land. The interdict addressed to B began with the words, *Unde tu illum vi dejecisti*, 'From the place you (B) forcibly ejected A', and commanded B to restore possession to A, provided that A had been in possession *nec vi, nec clam, nec precario*, *i.e.* had not obtained it originally from B by force, or clandestinely, or by B's permission.[1] If B obeyed the order, the proceedings ended; if, as was usual, there was a dispute, B had the option (the interdict not being *prohibitorium*) to demand a judge, and if he did so, a formula (*arbitraria*) was granted to try the questions of fact involved in the interdict. The proceedings *in judicio* would be in the ordinary form, and if the judge found that A, having been in possession *nec vi, nec clam, nec precario*, had been violently ejected by B, he would, alternatively, order B to restore possession or be condemned in damages. This procedure (by the *formula arbitraria*) is described by Gaius as without risk (*sine periculo*) to either party, as opposed to the procedure *per sponsionem*, which, as will be seen, was *cum periculo*. For if, in the *actio arbitraria*, the judge found against B, and he complied with the order, he did so without incurring any penalty. If, on the other hand, A failed to make out his case, he

[1] Where arms had been used there was an *interdictum unde vi armata* which differed from that *unde vi* (where the *vis* was *quotidiana*), for it was not limited to a year, and the words *nec vi*, etc., were omitted.

also suffered no detriment, unless the defendant had challenged him to a *judicium calumniae* for a tenth of the value of the thing in dispute by way of penalty.[1]

(*b*) *Per sponsionem* (i.) in single interdicts, *e.g. unde vi*; (ii.) in double interdicts, *e.g. uti possidetis, utrubi.*

(i.) *Procedure per sponsionem in single interdicts.*— If B in the above case did not demand a *judex* and failed to restore possession, A challenged him to a wager (*sponsio*), and B in return challenged A to a wager (*restipulatio*), the question at issue being whether or not B's continued possession constituted a violation of the interdict; *e.g.* whether A's possession when B ejected him was *nec vi, nec clam, nec precario* in relation to B. Upon these wagers formulae were drafted and tried in an ordinary *judicium.* If the judge found in favour of A, B would have to restore or pay damages,[2] and in any case the unsuccessful party forfeited to the other the amount of the wager. Hence the proceedings were *cum periculo.*

(ii.) *Procedure per sponsionem in double interdicts, i.e.* where both parties were at once plaintiff and defendant, *e.g. uti possidetis* and *utrubi.*

Both interdicts were prohibitory (and so could only be tried *per sponsionem*), and applied where two persons were disputing about the possession of property as a preliminary to a dispute about the ownership of it.[3] The interdict *uti possidetis* applied when the question was about immovable property, *utrubi* when it concerned movables. The interdict *uti*

[1] The Proculians thought the *judicium calumniae* inapplicable in such case (G. iv. 163).

[2] By virtue of a *judicium de re restituenda*, which was added to the formula at A's request (G. iv. 165).

[3] G. iv. 148.

possidetis prohibited the disturbance of the possession of that party who, in fact, held the land when the interdict was issued, provided it was *nec vi, nec clam, nec precario* in relation to his opponent. In the interdict *utrubi*, on the other hand, it was not necessarily the party in possession at the grant of the interdict *nec vi*, etc., who prevailed, but he who had possessed the movable *nec vi*, etc., *for the greater part of the past year.*

The procedure was as follows: the interdict (*e.g. uti possidetis*) was issued, in effect prohibiting the person not in possession at the date of the interdict from disturbing the possession of the person who then held the land *nec vi, nec clam, nec precario* in relation to him. Matters, obviously, would go no further (since the order was purely negative) until some act was done in violation of the interdict. Both parties, accordingly, made a formal trespass upon the land (*vis ex conventu*), and the ultimate trial was to ascertain which party had been justified in so doing, and which party in the wrong as having contravened the edict, *i.e.* which had, when the interdict was granted, been in actual possession, *nec vi*, etc.

The parties then appeared before the praetor, whose first duty necessarily was to award interim possession of the land until the question could be tried between the parties (A and B), and this was settled by awarding possession to the person who made the highest bid (*e.g.* B) for the profits and fruits which would accrue from the land until the main issue was settled at the trial.[1] B, however, was required to promise A by a *stipulatio* that if he lost the trial he would pay as a penalty the sum he offered for the profits to A. Next,

[1] The auction before the praetor was called *fructuum licitatio.*

A challenged B to a wager (*sponsio*) on the question whether B did wrong in the apparent act of trespass, which B accepted on A promising by a restipulation to pay the amount of the bet if in the wrong. Similarly B challenged A on the lawfulness of A's act, and there was a like restipulation, so that in all there were two bets,[1] which, having been put into the shape of formulae, were sent for trial. It is to be noted that a bet in Rome always involved two stipulations, so that on the two bets and the stipulation on the bidding there were five *condictiones certae pecuniae* in all to be submitted to the judge, who then heard the evidence and decided who had won his wager and *restipulatio*, *i.e.* which party, as a fact, when the interdict had been granted held the land *nec vi*, *nec clam*, *nec precario* in relation to the other. If the judgment were in favour of B, A had to pay B the amount due on the wagers only. If, on the other hand, it were in favour of A, A was acquitted from his obligation on his bet to B, and B was condemned—

(α) To pay A the amount of the bets due to A; and

(β) To pay A, as a penalty, the sum due from B on his bidding for the interim profits; or, where the lower bidder chose the *judicium fructuarium*, noted below, to pay A, compensation for the profits he actually got from the land; and

(γ) To give up possession to A.

But to enforce these latter rights (β and γ) a final

[1] A bet in England is regarded as one transaction. The parties mutually promise to pay if the event turns out against them. At Rome a bet was made up of two parts, a *sponsio* and a *restipulatio*. A, *e.g.*, asked B: If Balbus builds the wall, do you promise me five *aurei*? B answered *Spondeo*. This was the *sponsio*. Then the parts being reversed, A at B's request promised (*restipulatio*) to pay B five *aurei* if Balbus did not build.

judicium (*Cascellianum* or *secutorium*) might become necessary, *i.e.* if B refused to do the acts in question voluntarily; and a similar trial (*judicium fructuarium*) might also take place if, at the *fructuum licitatio*, A, instead of taking a stipulation from B for the amount of his penal bid for the interim profits, had elected to rely on such *judicium* to recover the profits, in which case B would be required at the time of the preliminary proceedings to give security *judicatum solvi*.[1]

It is obvious that the above proceedings could not be brought to a successful issue unless both parties were willing to go through certain forms, and it would therefore be in the power of one party to render the interdict useless as a means of determining the right to possession by refusing to take the necessary steps. The praetor, accordingly, devised a remedy. If one litigant refused duly to proceed, *e.g.* failed to make *vis ex conventu*, to bid for the fruits, to enter into the wagers, or to go on with the trial, he thereupon became liable to a secondary interdict (*interdictum secundarium*), by which he was compelled, if in possession, to restore it to the other party; if not, to abstain from forcibly disturbing his opponent. In other words, the party in default was treated as having admitted his opponent's case.

Gaius says (iv. 148) that the interdicts *uti possidetis* and *utrubi* were devised where persons were disputing about the *ownership* of a thing (*de proprietate*), and to decide who ought to be regarded as in possession, and who should be plaintiff in the action. It is obvious that the action referred to cannot be the

[1] G. iv. 169.

judicia on the interdicts themselves, for there both parties are plaintiffs, and the trials are not to decide a question of ownership but of possession merely. The fact is that the *judicium* on an interdict (at any rate on the possessory interdicts) was not necessarily final. Usually, no doubt, it was, because if A is claiming property from B, and can prove that he enjoys it as a fact, and that he neither obtained it from B by force, stealth, or permission, the chances are that A has a better title than B. It might, however, sometimes happen that even when A won on the interdict, *i.e.* proved actual possession under the required conditions, B could show, in spite of it, that he nevertheless was *dominus*; for the trial on the interdict did not go into the question of ownership at all, and in such case a subsequent action was necessary, for which the interdict had cleared the way; for it had decided that A (who had proved actual possession *nec vi*, etc.) ought to be regarded as in possession, and that therefore B (the person who lost on the interdict) was the proper plaintiff with the burden of proof to discharge.

Of the four possessory interdicts described by Gaius only the two last-mentioned (*uti possidetis* and *utrubi*) survived for any practical purpose in Justinian's time, the interdict *unde vi armata* having become obsolete, and the interdict *unde vi* less frequent, in consequence of the constitution of A.D. 389, above referred to. After that date a man who forcibly took property, if he were owner, forfeited not merely possession but the ownership itself, and, if not owner, was condemned to restore the property and pay its value. Under Justinian, the two surviving interdicts had the same effect, so that whether the dispute

concerned an immovable (*uti possidetis*) or movable (*utrubi*), he prevailed who, *at the time of litis contestatio*, was in possession *nec vi, nec clam, nec precario* in relation to his adversary.

But Justinian's treatment of interdicts as judicial proceedings, distinct from actions, is illogical, and arose from too closely following the text of Gaius as a model for his own book. The whole complicated procedure, depending as it did on the formulary system, had long ceased to be a reality, and, as Justinian himself confesses, there was, under the *extraordinaria judicia*, no necessity for interdicts, and judgment was given without them ;[1] accordingly, though the name survived, it was only to denote actions which were formerly begun in a special manner, and which, perhaps, were still considered as deserving a speedier trial than other actions.

2. *Restitutio in integrum.*

This was an exercise of the praetorian *imperium*, which, unlike the interdicts, was issued only after inquiry, to rescind some transaction which had detrimentally affected the legal position of the applicant and to restore the *status quo ante*. The application had ordinarily to be made within a year, and the grant might or might not be final. To succeed in the claim to this remedy proprietary loss of some sort had to be shown in conjunction with some cause which the praetor thought was sufficient. The most usual of these were *dolus* (fraud), *metus* (intimidation or duress), *minoritas* (*i.e.* in the case of young persons from twelve or fourteen to twenty-five, unless the *consensus* of the curator had been given, though this was not necessarily a bar, and only if the matter were one which a more

[1] J. iv. 15. 8.

experienced person would not have entered into); *absentia* due to State affairs, captivity, and the like, and *error*, but only in mistakes connected with procedure.

3. *Missio in possessionem.*

This was a magisterial decree based on the *imperium* authorising the grantee to take possession of, but not to remove, certain property belonging to another, generally with the purpose of putting pressure to bear upon him to perform a legal duty which devolved on him with respect to the grantee, *e.g.* where the owner of dangerous property refused to give security (*cautio damni infecti*) against apprehended damage due to his neglect to maintain the property in a safe condition; another common case is as a preliminary to proceedings in bankruptcy (*venditio bonorum*). There were quite a number of other cases.

4. *Praetorian stipulations.*

These were exacted in a variety of cases, the *cautio damni infecti* (*supra*) being a common one. Another was where the praetor gave rights of succession subject to *collatio bonorum*, *e.g.* to an *emancipatus*, a promise with a surety was exacted to secure this.

Section VI. Modes of Execution

In England if a defendant refuses to comply with a judgment it is usually given effect to (*i.e.* executed) by some officer of the State seizing the debtor's property, or some part of it, selling it, and paying the amount due to the plaintiff on the judgment out of the proceeds. If the person against whom judgment has been given is insolvent, he may be made a bankrupt; his property passes by a kind of universal succession to his trustee in

bankruptcy, who converts it into money and pays the creditors *pro rata*.

At Rome these conceptions were for a long time unknown, and the earliest form of execution was execution on the *person* of the debtor by *manus injectio*,[1] which has been already described in another aspect, viz. as a *legis actio*. Though by a *lex Poetelia* some time before 300 B.C. the severity of this form of execution was mitigated (the creditor's right to sell, kill, or maltreat his debtor being abolished),[2] *manus injectio*, as far as personal arrest was concerned, survived even under the formulary system, its practical effect being what would now be called 'imprisonment for debt'. By the time of Gaius, however, a new method of execution against the *property* of the debtor, devised by the praetor P. Rutilius Rufus, had become common, being known as *venditio bonorum*. The praetor, on the petition of the creditors or some of them, granted *missio in bona*, *i.e.* made an order authorising them to take possession of all the debtor's estate. After an interval of thirty days from the time the property had been seized, during which other creditors[3] could 'come in', *i.e.* join in the possession, the creditors met and elected a manager (*magister*) to conduct the sale, which, at the end of ten days more, took place by public auction. At the auction the estate of the debtor was sold as a whole to the highest bidder (*emptor bonorum*), who was bound to pay the other creditors the dividend he promised them by his bid, and who thereupon became entitled under the edict

[1] *Pignoris capio*, in its normal form, was not execution of a judgment, but a means by which certain special creditors could satisfy themselves without legal process at all.

[2] The date and effect of this law are much disputed.

[3] *I.e.* those who had not originally applied.

to the *universitas juris* of the debtor. The emptor, where the bankrupt was dead, being regarded as quasi-heir, could sue for debts owing to the estate by a formula based on such fiction (*actio Serviana*), or, if the bankrupt was alive, by the *formula Rutiliana*, where the *intentio* was in the name of the person whose estate he had purchased, the *condemnatio* in his own; conversely creditors of the estate could sue him by the like fiction, *i.e.* of heirship or by the formula Rutiliana. To get in the corporeal property belonging to the estate the emptor had the *interdictum possessorium*.[1]

This praetorian mode of execution may have been modelled upon the earlier *sectio bonorum*, which, however, was hardly execution properly so called, since it only applied where the State sold confiscated property (*e.g.* taken in war, or from a citizen on a criminal conviction). The sale was made by the *quaestors*, and the highest bidder (*sector bonorum*) became not merely praetorian owner, but owner *ex jure Quiritium*, though to assist him in getting in the property he was granted (*juris civilis adjuvandi causa*) the *interdictum sectorium*.[2]

Venditio bonorum, though akin to the modern conception of execution in so far as confined to the debtor's property, presents three fundamental differences—(i.) it involved the sale of the debtor's *whole* estate; (ii.) it rendered him *infamis* (whereas in England bankruptcy may or may not imply moral turpitude and so disgrace); and (iii.) when the proceedings were over, the debtor was not released; for since *bonorum venditio* was not one of the means of extinguishing obligations, the creditors could subsequently sue him, and so attack his after-acquired property.

[1] G. iv. 145. [2] G. iv. 146.

A more merciful method of execution, however, is mentioned by Gaius[1] (*cessio bonorum*) as sometimes taking place in his time under the Julian law. This law, probably passed under Augustus, enabled a debtor to make a voluntary cession of his goods to his creditors, who sold them in satisfaction, *pro tanto*, of their claims. A debtor adopting this method avoided infamy and was allowed a *beneficium competentiae*, *i.e.*, his creditors, though they might proceed against his after-acquired property, could not thereby deprive him of the bare necessaries of life. In the case of *clarae personae* (persons of rank) there was an alternative to *venditio bonorum*, for the creditors could elect to have a *curator* appointed to sell piecemeal so much of the debtor's effects as would satisfy their claims (*distractio bonorum*): this avoided *infamia*.

Finally, under the *cognitio* system, the modern idea that execution for a debt does not necessarily involve the necessity of selling the debtor's whole property[2] was arrived at, probably as a generalisation of the privilege formerly granted to *clarae personae*, so that the execution of an unsatisfied judgment, if it was for a specific thing, was effected by directing its seizure and delivery to the plaintiff; and if for a specific sum, by the seizure of so much of the debtor's property as was sufficient to satisfy the judgment (*pignus ex causa judicati captum*); a sale under the direction of the magistrate being made after two months.[3] If no buyer could be found, the creditor could take the property seized in satisfaction of his claim.

In the time of Justinian *manus injectio* was probably,

[1] G. iii. 78.

[2] Since he may not be insolvent.

[3] Cf. Roby, ii. 440.

and *venditio bonorum* certainly, obsolete. In the case of ordinary execution (*i.e.* where the debtor was not insolvent), the procedure was as last described, viz. by seizure and sale of part of the debtor's property under the order of the Court; when the execution was in bankruptcy, the procedure (unless the debtor made a voluntary *cessio bonorum*) was by *distractio bonorum*, which had displaced the *venditio bonorum*, and under this a *successio per universitatem* no longer took place. The magistrate, on the application of the creditors, appointed a curator, who, after an interval of two or four years,[1] sold the debtor's property in lots, the proceeds being divided up among the creditors. But even under this system the after-acquired property of the bankrupt could be seized by the creditors until they obtained payment in full.

Section VII. (a) Restraints on Vexatious Litigation

Gaius tells us that vexatious conduct (*calumnia*) on the part of a *plaintiff* might be restrained by a *judicium calumniae*, by a *judicium contrarium*, by *oath*, or a *restipulation*. The *calumniae judicium* was an order given to the judge to inquire, in the event of the defendant being absolved, whether the plaintiff's action was in fact merely vexatious; if it was, the plaintiff might be condemned in one-tenth of the value of the matter in dispute, save in the case of an *adsertor libertatis*, when the penalty was increased to one-third. This applied to all actions, and the defendant had the

[1] Creditors within the same province had two years, those in different provinces four, within which to 'come in'.

option either to have this remedy or to insist that the plaintiff should swear on oath (*jus jurandum*) that he had good ground for his action (*non calumniae causa agere*). The *contrarium judicium* only lay in exceptional cases (*e.g.* in the *actio injuriarum*) for a tenth or a fifth part of the claim ; but it was a more stringent remedy than the *judicium calumniae*, for the defendant was not required to prove *mala fides* on the part of the plaintiff, as in the latter proceeding ; he was entitled to judgment merely on the ground that the plaintiff had lost his action, although the plaintiff brought it under a genuine misapprehension. When entitled to a *judicium contrarium* the defendant might, alternatively, demand a *judicium calumniae* or require the plaintiff's oath, but the remedies were not cumulative. A fourth alternative to a defendant, under certain circumstances (*i.e.* where he was required, as in a *condictio*, to enter into a *sponsio poenalis*), was to demand that the plaintiff should promise a like sum if he failed, by *restipulatio*, and to this, upon acquittal, he was entitled without proof of malice.

In the time of Justinian all this had become obsolete ; in certain cases no action could be brought without the praetor's permission (*e.g.* against a parent or patron,[1] and in all cases the plaintiff was obliged—(i.) to swear on oath that he had good ground of action (*pro calumnia jurare*), a proceeding modelled on the old *jus jurandum* ; and (ii.) if he failed, to pay his opponent's costs.

A *defendant* in the time of Gaius was restrained from setting up a frivolous defence (i.) because condemnation in some actions (*e.g. actio furti, injuriarum, vi bonorum raptorum, pro socio*) made the defendant

[1] This was also the case in the time of Gaius.

infamis;[1] (ii.) in certain cases, defence increased the amount of his liability (*lis crescens*, *e.g.* under the *lex Aquilia*); (iii.) in certain cases, as in a *condictio certae pecuniae* and an *actio de constituta pecunia*, the defendant could be made to promise (by a *sponsio*) a penalty if he failed, viz. a third of the value in a *condictio*, and a half in the other action; failing other restraint, the praetor might require an oath that the defendant had a good cause of defence (*non calumniae causa infitias ire*).

Under Justinian the *sponsio poenalis* was obsolete, but a defendant had in all cases to swear that he had a good defence, and might still be liable to infamy in actions which involved it, and also to pay increased damages in cases in which *lis crescens infitiando*. The fact, which both Gaius and Justinian mention, that some actions (*e.g. furti*) were for more than single damages *ab initio*, would rather act as a restraint on a person contemplating the wrong involved than as an inducement not to defend.

[1] In the first three even a compromise was sufficient (G. iv. 182).

INDEX

Acceptilatio, 355
Accepti relatio, 356
Accessio (mode of acquiring property), 151; possessionis, vel temporis, 163
Accident, 372
Accrual (accessio), 151
Accusatio suspecti tutoris, 115
Acquisition, modes of, civil, 159; natural, 150
Actiones, Classes of:
Actio adjectitiae qualitatis, 340; arbitraria, 404, 410; bonae-fidei, 421; civilis, 419; directa, 421; fictitia, 375, 421; for the whole amount, for less, 425; honoraria, 419; in factum concepta, 420; praescriptis verbis, 420; in jus concepta, 420; in personam and in rem, 418; in simplum, duplum, etc., 425; mixta, 424; noxalia, 431; perpetua, 423; poenalis, 424; popularis, 381; praejudicialis, 419; rei persequendae causa, 424; stricti juris, 421; temporalis, 423; utilis, 420; vindictam spirans, 376
Actiones, Particular:
Actio ad exhibendum, 153, 368; ad supplendam legitimam, 218; auctoritatis, 161, 327; commodati, 290; communi dividundo, 334; conducti, 329; confessoria, 418; de arboribus succisis, 398; de effusis vel dejectis, 381; de eo quod certo loco, 430; de in rem verso, 341; de pauperie, 434; de peculio, 341; de pecunia constituta, 419; de rationibus distrahendis, 116; depositi, 298; de positis vel suspensis, 381; doli, 380; empti, 328; exercitoria, 342; ex stipulatu, 311; familiae erciscundae, 419; finium regundorum, 419; furti concepti, 366; manifesti, 365; nec manifesti, 365; non exhibiti, 367; oblati, 366; prohibiti, 366; injuriarum, 376; institoria, 342; judicati, 406; legis Aquiliae, 374; mandati, 339; negatoria, 418; negotiorum gestorum, 350; per sponsionem, 403; pigneratitia, 194; pro socio, 334; Publiciana, 143, 419; quanto minoris, 328; quasi Serviana, 194; quod jussu, 341; quod metus causa, 380; rationibus distrahendis, 116; redhibitoria, 328; recepticia, 420; rei uxoriae, 106; Serviana, 194; tributoria, 194; tutelae, 116, 342; venditi, 329; vi bonorum raptorum, 369
Addictio bonorum libertatis causa, 281
Aditio hereditatis, 221
Adjudicatio, 175, 410
Adolescens. *See* Cura
Adoptio, 82; plena and minus plena, 85
Adpromissio, 312
Adrogatio, 85; of impubes, 87
Adstipulatio, 312
Adventitia (bona), 91
Adventitia (dos), 104
Aediles, Curule, 17
Aelius, Sextus, 331
Aestimatum, 345
Affinity, 95
Agency, 340
Agnatio, 77; agnati, 78
Album judicum, 405
Aliens. *See* Peregrini
Alluvio, 151
Alveus derelictus, 151
Anastasius, 95
Animals ferae naturae, 150, 433
Animus sibi habendi, 146

Anniculi probatio, 67
Antichresis, 192, n. 1
Appeals, 414
Appius Claudius Caecus, 32
Aquiliana, stipulatio, 356
Aquilius Gallus, 33, 356
Arcarium nomen, 317
Argentarius, 420, 427
Assignment of obligations, 362, 382
Auctorati, 73
Auctoritas (tutors), 114
Augustus, 14, 23, 34, 37
Avulsio, 152

Banker. *See* Argentarius
Bankruptcy, 444
Beneficium abstinendi, 220; cedendarum actionum, 315; competentiae, 447; divisionis, 315; excussionis, or ordinis, 314; inventarii, 223; ordinis, 314; separationis, 220
Bluhme's theory, 143
Bona-fide serviens, 72; possessor, 144
Bona fides, 165
Bona materna, 91; materni generis, 91
Bonitary ownership (in bonis esse), 143; putativa, 165
Bonorum cessio, 447; distractio, 447; emptor, 445; possessio, 204, 278; sectio, 446; venditio, 445
Brevi manu traditio, 158
Brutus, 33

Caducum, 262
Calumnia, 448
Capitis deminutio, 126
Capito, 34
Capture in war, 151
Caracalla, 35, 76, 163, 208
Cato, 33
Causa lucrativa, 242; perpetua, 179
Causae conjectio, 390
Cautio damni infecti, 306; de dolo, 306; de persequendo servo, 306; judicio sisti, 417; legatorum, 306; Muciana, 228; rei uxoriae, 105; rem pupilli salvam fore, 307; rem ratam haberi, 307; usufructuaria, 182
Celsus, 34
Censor, 130
Census, 56, 58
Cessio actionum, 315, 339, 354; bonorum, 447
Chirographa, 321
Citations, law of, 39
Civil modes of acquisition, 159
Civis, civitas, 52, 74
Classical jurisprudence, 34
Claudius, 59, 61
Clausula codicillaris, 207
Cliens, 73
Codex Gregorianus, 40; Hermogenianus, 41; Justinianus, 40; repetitae praelectionis, 44; Theodosianus, 41
Codicilli (codicil), 206
Coelebs, 262
Coemptio, 99
Cognatio, 77
Cognitio extraordinaria, 415
Co-heirs, 226
Collatio bonorum, 271
Colonus, 73, 329
Comitia Calata, 9, 86; Centuriata, 10; Curiata, 9; Tributa, 11
Commercii (jus), 75
Commixtio, 152
Commodatum, 295
Compensatio (set-off), 426
Compromise (transactio), 346
Concilium plebis, 12, 14
Concubinatus, 102
Condemnatio, 409
Condictio. *See* Legis actio per condictionem; certi, 295, 311, 318; furtiva, 367; debiti soluti, 351; triticaria, 311
Confarreatio, 99
Confessio in jure, 413, 417
Confusio, 152, 384; bonorum, 223
Connubii (jus), 98
Consanguinei, 270
Consanguinitas, 98
Consensual contracts, 322
Consilium principis, 13
Consistorium, 13, 15
Constantine, 39, 81, 174
Constantius Chlorus, 174
Constitutiones, Imperial, 14
Constitutum, 347
Consumable things, 141
Contracts, 287, 290; re, 292; verbis, 299; litteris, 316; consensu, 322
Contrarius actus, 354
Contubernium, 102
Corpus juris civilis, 44
Corruptio servi, 380
Costs, 449
Creditor pignoris, 195
Cretio continua, vulgaris, 222
Culpa (negligence), 115, 327, 333, 339, 372
Cura, curator, 122

Curia, 82
Curule aediles, 17, 328
Custom, 6
Customary law, 6

Damage to property, 371
Damnum infectum, 401; injuria datum, 371
Debtor addictus, 74
Decemviri, 6
Decretum, 15, 417, 434
Deditícii, 67, 76
Deductio in domum, 102; servitutis, 184; de peculio, 341
Defences. *See* Exceptio
Delegation, 357
Delicts, 360
Demonstratio, 407
Deportatio in insulam, 128
Depositum, 297; irregulare, 298; miserabile, 298
Derelicta, res, 150
Detentio, 146
Dies cedit, venit, 220; fastus, 397
Diffarreatio, 107
Digest, 42, 43
Diocletian, 87, 122, 401, 416
Disinherison, 210
Distraint. *See* Pignoris capio
Divorce, 107
Dolus (fraud), 379
Dominica potestas, 77
Dominium, 141; bonitary, 143; ex jure Quiritium, 141; ex jure gentium, 144; of provincial lands, 144
Domitian, 13, 35
Donatio inter vivos, 171; ante nuptias, 106; mortis causa, 172; propter nuptias, 106
Dorotheus, 44
Dos, 104
Dotis dictio, 105; instrumentum, 81
Duplicatio, 409

Edict of the Curule Aediles, 17, 27
Edict of the Praetor, 16
Edicts of the Emperor, 15
Edictum Hadrianum (Julianum or Salvianum), 27; perpetuum, 16, 22; provinciale, 17, 46; repentinum, 16; tralatitium, 17
Emancipatio, 31; Anastasiana, 95
Emphyteusis, 156, 199
Emptio venditio (sale), 323
Epistola (of the Emperor), 15
Equity, 24
Erroris causae probatio, 69
Esse in libertate, 59
Eviction, 327
Exacta diligentia, 331
Exceptio, 408; dilatoria, 409; doli mali, 291; legis Plaetoriae, 123, 125; litis dividuae, 430; metus, 379; pacti, 384; pecuniae non numeratae, 321; peremptoria, 409; perpetua, 409; personae coherens, 401; rei judicatae vel in judicium deductae, 411; rei venditae et traditae, 143; restitutae hereditatis, 257; S.C. Macedoniani, 295; S.C. Trebelliani, 257; S.C. Velleiani, 315; temporalis, 409
Exchange, 345
Execution, 444
Exercitor, 342
Exheredatio, 210
Existimatio, 129
Expensilatio, 317
Expromissio, 357
Extranea persona, 195
Extraordinary procedure, 415

Falcidian fourth, 249
Familia, 52, 77, 79
Familiae emptor, 200
Fas, 9
Fictio legis Corneliae, 55
Fictions, 403
Fideicommissarius, 252
Fideicommissum, 252, 255
Fidejussio, 314
Fidepromissio, 313
Fiducia, 190
Fiduciarius, 252
Filiusfamilias, 90-94
Fiscus, 159
Flamen Dialis, 94
Flavius, 32
Foreclosure, 194
Foreigners, 19
Formula, 402; petitoria, 404; arbitraria, 437
Formulary system, 397
Fraud. *See* Dolus
Freedman, 70
Fructus, 156; licitatio, 441
Fructuum perceptio, 156
Fundus dotalis, 105
Furiosus, 122
Furtum, 362; conceptum, 366; lance licioque conceptum, 366; manifestum, 366; nec manifestum, 365; non exhibitum, 367; oblatum, 366; possessionis, 364; prohibitum, 367; usus, 363

Gaius, 34, 45, 50, 56, 188
Gens, 79 n. 1
Gift. *See* Donatio
Gordian, 282
Guardianship. *See* Tutela and Cura

Habitatio, 184
Hadrian, 14, 34, 38, 39, 46, 56, 61, 120, 159
Half-blood, 275
Hereditas jacens, 221
Hereditatis petitio, 407; fideicommissum, 255
Heir. *See* Heres
Heres, 219; suus, 220; necessarius, 219; extraneus, 220
Hire, 329
Hotchpot, 271
Husband and wife. *See* Manus
Hypotheca, 193

Imperial legislation, 14
Imperium, 11
Impossibility of performance, 359
Inaedificatio, 152
In bonis esse. *See* Bonitary ownership
Incertae personae, 215, 244
Infamia, 130
Infans, 115
Ingenuus, 49
Ingratitude, 56
In integrum restitutio, 123, 224, 415, 430, 443
In jure and in judicio, 387, 405
In jure cessio, 161; hereditatis, 283
Injuria, 375; atrox, 378
In jus vocatio, 405
In libertate esse, 59
Innkeeper, 381
Innominate contracts, 344
Inofficiosum testamentum, 216
Inquilinus, 329
Institor, 342
Institutes, 44
Institution of heres, 209
Insula nata, 151
Intentio, 408
Intercessio, 315
Interdicts, 434
Interdictum adipiscendae possessionis, 436; de homine libero exhibendo, 435; exhibitorium, 435; possessorium, 436; prohibitorium, 435; quorum bonorum, 279; recuperandae possessionis, 436; restitutorium, 435; retinendae possessionis, 436; Salvianum, 163; secutorium, 441; secundarium, 441; unde vi, 437; uti possidetis, 436; utrubi, 441
Interpretation, 25, 27
Interrogatio in jure, 413, 417
Intestate succession, 267; civil law rules, 267; praetor's reforms, 269; other changes, 273; Justinian's final scheme, 274; to freedmen, 275; to a filius-familias, 276
Invecta et illata, 193
Inventory, 115, 225
Iteratio, 69

Jhering, 147
Judex, 387; pedaneus, 416; qui litem suam facit, 380
Judgment, 414; debtor (judicatus), 393
Judicati, 74
Judicis postulatio, 391
Judicium calumniae, 448; Cascellianum, 441; contrarium, 448; divisorium, 410; fructuarium, 441; imperio continens, 423; legitimum, 423; secutorium, 441; stricti juris, 411
Julianus, Salvius, 26, 35
Jura in re aliena, 176
Jurata promissio liberti, 71
Jurisdictio, 18
Jurists, 33
Jus Aelianum, 32; aureorum anulorum, 72; civile, 1, 18, 19; commercii, 75; connubii, 75; edicendi, 16; Flavianum, 32; gentium, 1; honorarium, 1, 26; honorum, 75; naturale, 1; Papirianum, 8; postliminii, 55; postulandi, 130; publicum, 47; respondendi, 34, 37; scriptum, 5; non scriptum, 5; strictum, 25; suffragii, 75; trium vel quatuor liberorum, 120; vitae necisque, 61
Jus jurandum in litem, 404; de calumnia, 449
Justa causa, 158, 165
Justae nuptiae, 80, 97
Justinian, 40, 53, 56, 57, 62, 81, 156, 175, 215, 425
Justum matrimonium, 102
Justus titulus, 165

Labeo, 34, 323
Laesio enormis, 324
Land, 140
Latini coloniarii, 76

Latini Juniani, 69, 75, 76
Latinitas, 75
Law of Citations, 39; of Nature, 4, 22
Legacies, 234; what could be given as, 240; construction of, 244; restrictions on, 248
Legatum per damnationem, 236; per praeceptionem, 238; per vindicationem, 235; sinendi modo, 237
Leges. *See* Lex; caducariae, 262; regiae, 8
Legis actio, 18
Legis actio per condictionem, 391; per judicis postulationem, 391; per manus injectionem, 393; per pignoris capionem, 395; sacramenti, 388
Legitimation, 80
Letting and hiring, 329
Lex regia, 10, 14
Lex (statute law), 8; Aebutia, 18, 23, 401; Aelia sentia, 72; Anastasiana, 65, 66, 354; Apuleia, 313, 371; Aquilia, 64; Atilia, 113; Atinia, 163; Calpurnia, 300; Canuleia, 19; Cicereia, 313; Cincia, 173; Claudia, 120; Cornelia, 67, 81; Cornelia de Sicariis, 62, 65; Cornelia testamentaria, 55; duodecim tabularum, *See* Twelve Tables; Falcidia, 173, 249; Fufia Caninia, 65, 68, 72; Furia de sponsu, 313; Furia testamentaria, 248, 395; Hortensia, 12; Julia (cessio bonorum), 447; Julia de vi, 371; Julia judicaria, 23, 401; Julia et Papia Poppaea, 120, 130; Julia et Plautia, 163; Julia et Titia, 113; Junia Norbana, 67, 68; Marcia, 395; Ovinia, 12, 13; Papia Poppaea, 262; Petronia, 61; Pinaria, 390; Plaetoria, 123, 395; Poetelia, 293; Publilia, 313, 394; Publilia Philonis, 10; Scribonia, 185; Silia, 300, 403; Vallia, 395; Valeria Horatia, 11; Voconia, 248; Zenoniana, 188
Libel and slander, 376, 417
Libellus contradictionis, 417; conventionis, 416
Libertas, 52, 54
Libertus, 58; orcinus, 58
Libripens, 31
Limitations of actions, 423
Lis crescens, 351
Literal contract, 316; Justinianus, 320
Litis contestatio, 353, 384, 398, 411, 417
Loan, 294, 295
Locatio conductio, 329
Longissimi temporis praescriptio (possessio), 171
Longi temporis praescriptio (possessio), 170
Lucrativae causae, 242
Lunatic. *See* Furiosus

Maine, 6, 20, 29, 53, 139
Mancipatio, 160; fiduciae causa, 160; nummo uno, 31
Mancipatory will. *See* Testamentum per aes et libram
Mancipii causa, 79, 96
Mandata (of the Emperor), 16
Mandatum, 336; in rem suam, 353; qualificatum, 338; tua gratia, 339
Manilius, 33
Manumissio, 57
Manumissor, parens, 95
Manus, 97; injectio, 393, 445
Marcus Aurelius, 46, 76, 113, 124, 282, 428
Marriage. *See* Justae nuptiae
Matrimonium jure gentium, 98
Matrimonium (justum), 162
Merger, 187
Metus, 379
Minor, 123
Missio in bona, 444
Mistake, 69, 245, 311, 351
Modestinus, 34, 35, 39
Mortis causa, donatio, 172
Mother, 273
Mutuum, 294

Natalium restitutio, 72
Naturalis obligatio, 289
Natural modes of acquisition, 150
Necessarius heres, 219
Negligence. *See* Culpa
Negotia bonae-fidei, 294 n. 3; stricti juris, 294 n. 3
Negotiorum gestio, 349
Nerva, 14
Nexi, 74
Nexi solutio, 355
Nexum, 292
Niebuhr, 45
Nomen arcarium, 317; transcripticium, 317
Nominatio judicis, 405, 407

Nota censoria, 130
Novation, 357, 383
Novels, 44
Noxae deditio, 65, 93, 431
Noxal action, 431
Nudum jus quiritium, 165; pactum, 308
Nuncupatio, 201, 202
Nuptiae. *See* Justae nuptiae

Oblatio curiae, 82
Obligations, 285; classification, 287
Occupatio, 150
Omnia judicia esse absolutoria, 412
Ope exceptionis, 360, 384
Operae illiberales, 331; servorum, 184
Optionis legatum, 244
Optivus (tutor), 118
Oratio, 15
Orbi, 262
Orcinus, 58
Ownership, 141

Pacta legitima, 347; nuda and vestita, 346
Pactum adjectum, 326, 422; de non petendo, 409; donationis, 174
Pandects, 42
Papinian, 35, 39, 401
Papirianum, jus, 8
Parapherna, 104
Pardon, 383
Parens manumissor, 95
Partiarius legatarius, partitio, 241
Partition suit, 336
Partnership. *See* Societas
Paterfamilias, 79
Patria potestas, 75, 80, 90
Patricians and plebeians, 10
Patronus, 56, 66, 71
Paulus, Julius, 39, 43, 146
Pauperies, 433
Peculium (of slave), 62
Peculium adventicium, 91; castrense, 91; profecticium, 91; quasi-castrense, 91
Penalty, 361, 424
Peregrini, 19
Performance (of obligations), 356, 383
Periculum rei, 325, 330
Permissive possession, 271
Permutatio, 345
Perpetua mulierum tutela, 117
Personal execution, 444; servitudes, 179
Persons, the law of, 49
Petitio hereditatis possessoria, 280
Pictura, 154
Pignoris capio, 395
Pignus, 191; ex causa judicati captum, 447
Pius, 46, 55, 61, 87, 174
Plantatio, 153
Plebeians, 10, 12
Plebiscitum, 12
Pledge. *See* Pignus
Plus petitio, 429
Pontiffs, 27
Possession, 145
Postliminium, 55, 59
Post-Theodosian Novels, 41
Postumi, 213; alieni, 215
Potestas. *See* Dominicia and Patria potestas
Praedes litis et vindiciarium, 390
Praediator, 169
Praedium dominans and serviens, 179
Praefectus urbi, 113
Praescriptio longi temporis, 170; longissimi temporis, 171; pro actore, pro reo, 407
Praeterito, 210, 215
Praetor, influence of, 16; fideicommissarius, 252; peregrinus, 2, 3, 4, 18, 19; urbanus, 17, 22
Praetorian will, 203
Precarium, 146, 345
Prescription. *See* Limitation of actions
Principium placita, 14
Private law, 47
Privileged wills, 208
Procedure, 385
Proculians, 34, 155, 239, 323, 357
Procurator, 353
Prodigus, 122
Pro herede gestio, 222
Property, law of, 133
Provincial land, 144, 169
Puberty, 99
Publicatio, 335
Public law, 47
Pupillaris substitutio, 231
Pupillus, 108, 194

Quaestor, 446
Quarta Antonina, 88; Divi Pii, 88; Falcidia, 249
Quasi contracts, 349; delicts, 338; usufruct, 182; traditio, 185
Querela inofficiosi testamenti, 216
Quinquaginta decisiones, 42
Quiritary ownership, 165

Rapina, 369
Real actions, 418; contracts, 292
Receptum, 347 n. 1, 420

Recuperatores, 19, 67
Redempti, 74
Regula Catoniana, 243, 245
Release. *See* Acceptilatio
Relegatio in insulam, 128
Replicatio, 409
Repudium, 107
Res (classification of), 136
Res communes, 137; corporales and incorporales, 137; derelictae, 150; divini juris, 130; extra commercium, 163; fungibiles, 141; furtivae, 135; humani juris, 136; in commercio, 138; incorporales, 137; in patrimonio, 137; mancipi and nec mancipi, 138; mobiles—immobiles, 140; nullius, 137; publicae, 136; quae pondere, numero mensurave constant, 141; religiosae, 136; sacrae, 136; sanctae, 136; vi possessae, 135
Rescripta (of the Emperor), 15
Res perit domino, 325, 330
Responsa prudentium, 27, 37
Restitutio in integrum, 123, 443; natalium, 72
Restrictions on manumission, 65
Ruptum (testamentum), 238
Rutilius Rufus, 33, 445

Sabinians, 34, 155, 238, 323, 357
Sacramentum, 388
Sale. *See* Emptio venditio, Mancipatio
Salvius Julianus, 26, 35
Savigny, 45, 50, 146
Scaevola, Q. Cervidius, 33; Q. Mucius, 22
Schools of law, 34
Scriptura, 154
Sectio bonorum, 446
Self-help, 386
Semel heres semper heres, 227
Senate, 9, 12, 13
Senatus consultum, 12; Claudianum, 56; Juventianum, 168 n. 3; Largianum, 276 n. 2; Macedonianum, 295; Neronianum, 239; Orphitianum, 46; Pegasianum, 254; Tertullianum, 46; Trebellianum, 256; Velleianum, 113
Sententia, 414
Separatio bonorum, 223
Sequester, 146
Servitudes, 177; positive, negative, 178; praedial, personal, 179
Servitus actus, itineris, viae, 180; altius non tollendi, 149; altius tollendi, 180; aquaeductus, 181; aquaehaustus, 181; calcis coquendae, 181; harenae fodiendae, 181; ne luminibus officiatur, 180; oneris ferendi, 179; pascendi, 181; pecoris ad aquam appulsus, 181; stillicidii avertendi, 180; tigni immittendi, 180
Servius Sulpicius, 33
Servius Tullius, 10, 11, 139
Servus, 54; poenae, 56
Set-off. *See* Compensatio
Severus, 163, 208
Sextus Aelius, 33
Singular as opposed to universal succession, 196
Slavery, 55; adoption of slave, 88
Social war, 76
Societas, 331
Sohm, 26, 36
Soldier (will), 208
Solutio, 356
Spatium deliberandi, 225
Specificatio, 155
Sponsio, 313; poenalis, 404, 437; praejudicialis, 404
Sportulae, 425 n. 5
Statu liber, 72
Statute law, 5
Stipulatio, 299; divisions of, 305; useless, 307; actions to enforce, 311; joint parties to, 312
Stoic philosophy, 20
Studemund, 45
Subscriptiones, 15
Substitutio pupillaris, 231; quasi pupillaris, 233; vulgaris, 228
Successio in capita and in stirpes, 268; ordinum, 269
Succession, 196
Sui heredes, 220; juris, 77
Superficies, 189
Superficies solo cedit, 153
Suretyship, 312, 338
Suspecti tutoris accusatio, 115
Syngraphae, 321

Taxatio, 410
Tempus ad deliberandum, 222
Testamentary guardianship, 109, 118; succession, 198
Testamenti factio, 259
Testamentum, 199; blind persons, 261; calatis comitiis, 199; inofficiosum, *See* Querela; in procinctu, 250; militare, 208;

parentum inter liberos, 209; per aes et libram, 200; ruri conditum, 209; tempore pestis, 209; tripertitum, 206
Theft. *See* Furtum
Themistes, 6
Theophilus, 41, 44, 48
Thing. *See* Res
Tiberius, 101
Tiberius Coruncanius, 32
Traditio, 157; brevi manu, 159
Tralatitium edictum, 17
Transactio, 346
Transcripticium nomen, 317
Transfer of hereditas, 283; obligations, 344, 352; tutela, 106
Translatio (of legacies), 251
Treasure trove, 159
Tribonian, 41, 42, 44
Trinoctii absentia, 100
Trust. *See* Fideicommissum
Tutela, 108; agnatorum, 111, 118; cessicia, 119; dativa, 113, 119; fiduciaria, 112; impuberum, 108; legitima, 109, 119; mulierum, 117; parentum, 111, 118; patronorum, 111, 119; testamentaria, 109, 118
Tutor. *See* Tutela; Atilianus, 113; optivus, 118
Twelve Tables, 5, 6, 7, 11; accusatio suspecti, 115; actio de arboribus succissis, 398; actio de tigno juncto, 153; actio rationibus distrahendis, 116; cura, 122; furtum, 365, 366, 367; infamia, 130; injuria, 377; intestate succession, 267; mancipatio, 30, 31; manus injectio, 393; nuncupatio, 262; patron, 56, 275; pauperies, 433; pignoris capio, 396; three sales of a filius, 31; trinocti absentia, 100; tutela, 109, 110, 111, 115; usucapio, 162, 163; will-making, 203

Ulpian, 35, 43, 232
Unde cognati, 272; legitimi, 272; liberi, 271; vir et uxor, 273
Universal succession. *See* Succession
Universitas, 197
Usucapio, 162; lucrativa, 167; pro herede, 167; libertatis, 188
Usufruct, 181
Usureceptio, 168; expraediatura, 169
Usurpatio, 100, 163
Usus (manus), 100; (species of servitude), 183
Uxor, 101

Vadimonium, 405
Venditio bonorum, 445
Verbal contract. *See* Stipulatio
Vespasian, 56
Vestal virgin, 94, 120
Veteres, 32, 36
Vexatious litigation, 448
Viator, 425
Vindicatio, 367, 418
Vindicias dicebat, 390
Vindicta (manumission), 57
Vis ex conventu, 439
Vulgaris substitutio, 228

Ward. *See* Tutela, Cura
Whole blood, relations of the, 275
Wife. *See* Manus
Wild animals, 150, 433
Wills. *See* Testamentum
Women. *See* Manus, Tutela, Testamenti factio

Zeno, 188, 430

THE END

Printed in Great Britain by R. & R. Clark, Limited, *Edinburgh.*

WORKS ON LAW

BY A. V. DICEY, D.C.L.

INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION. Eighth edition. 8vo. 12s. 6d. net.

LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY. Second edition. 8vo. 12s. 6d. net.

MEMORIALS OF ALBERT VENN DICEY. Being chiefly Letters and Diaries. Edited by ROBERT S. RAIT, C.B.E. With Portraits. 8vo. 12s. 6d. net.

BY SIR FREDERICK POLLOCK, BART., LL.D.

A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS. Sixth edition. Crown 8vo. 7s. 6d. net.

ESSAYS IN THE LAW. 8vo. 12s. 6d. net.

BY T. J. LAWRENCE, LL.D.

THE PRINCIPLES OF INTERNATIONAL LAW. Seventh edition, revised by PERCY H. WINFIELD, LL.D. 8vo. 16s. net.

A HANDBOOK OF PUBLIC INTERNATIONAL LAW. Tenth edition, revised by PERCY H. WINFIELD, LL.D. Globe 8vo. 3s. 6d. net.

DOCUMENTS ILLUSTRATIVE OF INTERNATIONAL LAW. 8vo. 10s. net.

MACMILLAN & CO., LTD., LONDON

WORKS ON LAW

BY SIR JAMES FITZJAMES STEPHEN, BART.

A DIGEST OF THE LAW OF EVIDENCE. Eleventh edition by Sir H. Stephen, Bart., and Sir H. Lushington Stephen. Crown 8vo. 6s. net.

A DIGEST OF THE LAW OF EVIDENCE. New South Wales Edition by Henry Giles Shaw, M.A. 8vo. 10s. net.

A HISTORY OF THE CRIMINAL LAW OF ENGLAND. Three vols. 8vo. 30s. net.

A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND. Second edition. 8vo. 10s. net.

A DIGEST OF THE LAW OF CRIMINAL PROCEDURE IN INDICTABLE OFFENCES. By Sir James Fitzjames Stephen, Bart., and Herbert Stephen, LL.M. 8vo. 10s. net.

JUSTICE AND ADMINISTRATIVE LAW. A Study of the British Constitution. By W. A. Robson, Ph.D. 8vo. 12s. 6d. net.

SOME LESSONS FROM OUR LEGAL HISTORY. By Prof. W. S. Holdsworth, D.C.L. Crown 8vo. 8s. 6d. net.

DUTIES AND LIABILITIES OF TRUSTEES. By Right Hon. Augustine Birrell, K.C. Globe 8vo. 3s. 6d. net.

THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME. By Coleman Phillipson, M.A., LL.D. With Introduction by Sir John Macdonell. 2 vols. 8vo. 25s. net.

DATE DUE

GAYLORD			PRINTED IN U.S.A.

000359

KBD
.L4
W

Leage, R. W.
Roman private law.

000359

KBD
.L4
W

Leage, R. W.
Roman private law.

000359

KBD
.L4
W

Leage, R. W.

Roman private law.

DR. NORMAN A. WIGGINS